CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 201

HARRY M. BLACKMER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JULY 3, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,015)

(36,015)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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Court of Appeals of the District of Columbia

No. 5132.

HARRY M BLACKMER, Appellant,

vs.

UNITED STATES.

a Supreme Court of the District of Columbia.

Contempt. No. 18.

UNITED STATES, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia,

Holding a Criminal Term.

In Contempt. No. 18.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

Petition for Issuance of Subpœnas under the Act of July 3, 1926.

Filed Jan. 9, 1928.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

Criminal. No. 43324.

UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The petition of Peyton Gordon, United States Attorney in and for the District of Columbia, and of Atlee Pomerene

and Owen J. Roberts, Special Assistants to the Attorney General of the United States, respectfully represents:

1. The above captioned cause is set for trial before one of the Justices of your honorable Court on Monday, the 2d day of April, 1928. Your petitioners desire the attendance at the trial of the above captioned cause of James E. O'Neil and H. M. Blackmer. The said James E. O'Neil and H. M. Blackmer are citizens of the United States and are now beyond the jurisdiction of the United States, your petitioners being advised that they are, or both lately have been, in the Republic of France.

2. That your petitioners believe and therefore aver that the attendance of the said persons at the trial of the said cause is vital and important to the United States, because as your petitioners aver, they believe that the said witnesses have knowledge and information with regard to certain important facts which the United States desires to prove in the said cause, and that their testimony as to said facts will be material in connection with the establishment not only of the conspiracy charged between the defendants in the above captioned cause, but in connection with the proof of overt acts done by the defendants pursuant to said conspiracy. More particularly your petitioners believe and therefore aver that the said James E. O'Neil and H. M. Blackmer can testify to facts concerning the persons who were in the latter part of the year 1921 and during the year 1922 stockholders of the Continental Trading Company, Ltd., a corporation, and with regard to the distribution by that corporation to its stockholders of certain United States 3½% Liberty Loan Bonds as dividends, certain of which bonds, as your petitioners believe and therefore aver, were subsequently delivered by or on behalf of one of the defendants, Harry F. Sinclair, to the other defendant, Albert B. Fall.

3. That your petitioners base this petition upon the provisions of an Act of Congress, being No. 483 of the 68th Congress entitled "An Act relating to contempts", approved July 3, 1926.

Wherefore, your petitioners pray that your honorable Court, or one of the Justices thereof, may order that subpœnas issue in this cause addressed to any Consul General or Consul of the United States within the Republic of

France, or within any country in which either of the said witnesses may be, commanding such witness to appear before this Court in Criminal Court No. 2, at the City of Washington, D. C., on the 2d day of April, 1928

And your petitioners further pray that your honorable Court, or the Justice entering the order upon this petition, fix the amount which shall be tendered to the said witnesses respectively for their necessary expenses in travelling to and from the City of Washington, D. C., where this honorable Court sits, and the expenses of his attendance upon the Court; and your petitioners respectfully represent that $500.00 is a proper sum to be fixed in that behalf.

3 And your petitioners will ever pray, etc.

PEYTON GORDON,
United States Attorney.
ATLEE POMERENE,
OWEN J. ROBERTS,
Special Assistants to the Attorney General.

4 UNITED STATES OF AMERICA,
District of Columbia, ss:

Atlee Pomerene, having been duly sworn according to law, did depose and say that the facts set forth in the foregoing petition are just, true and correct to the best of his knowledge, information and belief.

ATLEE POMERENE.

Sworn to and subscribed before me this 9th day of January, 1928.

[NOTARIAL SEAL.] CARLTON G. SCHENKEN,
Notary Public, D. C.

Endorsed: Criminal. No. 43324. In the Supreme Court of the District of Columbia. United States vs. Harry F. Sinclair and Albert B. Fall. Petition for issuance of subpœnas under the Act of July 3, 1926.

5 *Order.*

Filed Jan. 9, 1928.

Upon consideration of the petition of Peyton Gordon, United States Attorney in and for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Assist-

ants to the Attorney General of the United States, this day filed praying for the issuance of subpœnas under the Act of July 3, 1926, it is by the Court this 9th day of January, 1928, ordered:

1. That subpœnas issued as prayed for in the said petition which subpœnas shall at the request of the petitioners be addressed to any consul of the United States in the Republic of France, or in any other country where said witnesses may be ascertained to be, commanding said witnesses to be and appear before this Court in Criminal Court No. 2 thereof, on the 2d day of April, 1928.

2. That the amount to be tendered to each of the said witnesses for his necessary expenses in traveling to and from Washington, D. C. and for his attendance at Court, is fixed and determined at $500.00.

(Signed) F. L. SIDDONS,
Justice.

Endorsed: Criminal. No. 43324. In the Supreme Court of the District of Columbia. United States vs. Harry F. Sinclair and Albert B. Fall. Order.

6 *Summons for the United States.*

In the Supreme Court of the District of Columbia.

No. 43324, Criminal Docket.

THE UNITED STATES
vs.
HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to H. M. Blackmer, Paris, France:

You are hereby commanded to attend the said court on Monday, April 2nd, 1928, at ten o'clock A. M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness the Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk.

By R. E. BOUCHER,
Assistant Clerk.

(On the Back:) Criminal. No. 43324. United States vs. Harry F. Sinclair & Albert B. Fall. Summons for the United States Criminal Court No. 2. To George Orr, Consul of the United States, Paris France: By order of the Court, you are hereby directed to serve the within subpœna and true return thereon to make to this Court. Frank E. Cunningham, Clerk Supreme Court of the District of Columbia.

7 *Consul's Return.*

Summoned personally all, the first day of February, 1928. H. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France.

And I further certify that pursuant to the order of the court I did at the time of said service tender to the said H. M. Blackmer the sum of five hundred dollars currency of the United States of America, which tender the said H. M. Blackmer then and there refused.

GEORGE ORR,
Consul.

1230
No fee prescribed.

8 *Petition for Rule to Show Cause.*

Filed Jul. 6, 1928.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

No. 18.

In Contempt.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

And now come, Leo A. Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and represent to the Court:

1. That on or about the 9th day of January, 1928, they presented their petition to this Honorable Court in accordance with the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) for the issuance of subpœnas directed to one H. M. Blackmer, who was and is a citizen of the United States to appear before this Honorable Court on Monday, April 2, 1928, as a witness in the case of The United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43324, on the docket of this Court and said petition now appears of record therein.

2. That on said 9th day of January 1928 this Honorable Court made an order based upon the said petition for the issuance of said subpœnas and on the 12th day of January, 1928, subpœnas were duly issued in accordance with the terms of the said Act of Congress and the said order of the court directed to the Consuls of the United States and foreign countries for service upon said H. M. Blackmer.

9 3. That said subpœnas commanded the said H. M. Blackmer to appear before this Honorable Court at a criminal term thereof in the City of Washington, District of Columbia, on Monday, April 2, 1928, at 10 o'clock a. m. to testify on behalf of the United States in said criminal case No. 43,324 and not depart the Court without leave of the Court or District Attorney.

4. That in order aforesaid it was specified that upon service of any of said subpœnas the Consul serving the same should tender to said H. M. Blackmer the sum of Five Hundred Dollars ($500) for his necessary expenses in traveling to and from the place at which said Court sits and his expenses in attendance thereat.

5. That on the first day of February 1928 George Orr, a Consul of the United States at Paris, France, served one of said subpœnas upon said H. M. Blackmer, at Paris, France by exhibiting the same personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France. And said Consul at the same time tendered to the said H. M. Blackmer the sum of Five Hundred Dollars ($500.00) in currency of the United States of America, and the said H. M. Blackmer refused to take the said moneys, or any part thereof.

6. That said Consul above mentioned made due return of the service of said subpoenas and the tender of said money

as aforesaid to the Clerk of this Honorable Court, as appears of record in said cause, a true copy of said subpoena and return thereof are hereunto attached marked Exhibit "A," which copy is hereby made a part hereof.

10 7. That the trial of said case was continued by the Court to Monday, April 9, 1928.

8. That the trial of said criminal case No. 43,324 was commenced in this Court at 10 o'clock a. m. on Monday, April 9, 1928; that the said special counsel requested the Court to have the Clerk call the said H. M. Blackmer as a witness; that the Court so instructed the Clerk and the Clerk called "H. M. Blackmer"; that said H. M. Blackmer did not respond to said call and neglected and refused to appear.

Wherefore the said Leo A. Rover, United States Attorney as aforesaid, and said Atlee Pomerene and Owen J. Roberts, Special Counsel as aforesaid, pray this Honorable Court to issue an order in accordance with Section 4, C. 762 of the said Act of July 3, 1926, directing the witness, H. M. Blackmer, to appear before said Court upon a day and at a time to be designated in said order to show cause why he should not be adjudged guilty of contempt and punished accordingly.

And they further pray that this Honorable Court will direct as a part of said order and in accordance with Section 5, C. 762 of said Act of July 3, 1926, that the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or such other amount and value as to the Court may seem proper, be levied upon and seized by the Marshal of said Court and held to satisfy any judgment that may be rendered against said H. M. Blackmer in this proceeding.

And they further pray that this Honorable Court will direct as a part of said order and in accordance with Section 6, C. 762 of said Act that the Marshal, upon hav-

11 ing made such levy and seizure, shall forward to the Consuls of the United States in any countries where said H. M. Blackmer may be, a copy of said order for personal service upon said H. M. Blackmer, and shall cause said order to be published in a newspaper of general cir-

culation in the District of Columbia once each week for six consecutive weeks.

And your petitioner will ever pray, etc.

LEO A. ROVER,
United States Attorney for the District of Columbia.
OWEN J. ROBERTS,
ATLEE POMERENE,
Special Counsel for the United States.

12 EXHIBIT "A".

Filed Jul. 6, 1928.

Supreme Court of the District of Columbia.

No. 43324, Criminal Docket.

THE UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to H. M. Blackmer, Paris, France:

You are hereby commanded to attend the said court on Monday, April 2nd, 1928, at ten o'clock A. M., to testify on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness, the Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk,
By R. E. BOUCHER,
Assistant Clerk.

(On the back): Criminal. No. 43324. United States vs. Harry F. Sinclair & Albert B. Fall. Summons for the United States. Criminal Court No. 2. To George Orr, Consul of the United States, Paris, France. By order of the Court, you are hereby directed to serve the within subpoena and true return thereon to make to this Court. Frank E. Cunningham, Clerk Supreme Court of the District of Columbia.

Consul's Return.

Summoned personally all, the first day of February, 1928, S. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France.

And I further certify that pursuant to the order of the court I did at the time of said service tender to the said H. M. Blackmer the sum of five hundred dollars cur-
13 rency of the United States of America, which tender the said H. M. Blackmer then and there refused.

GEORGE ORR,
Consul.

1230.
No fee prescribed.

14 *Order to Show Cause.*

Filed Jul. 6, 1928.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

In Contempt.

No. 18.

UNITED STATES OF AMERICA, Plaintiff,

vs.

HARRY M. BLACKMER, Defendant.

Order to Show Cause.

Upon the motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 15th day of October, 1928, at 10 o'clock A. M. and show cause, if any he has, why he the said H. M. Blackmer should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpœna heretofore issued by said Court and served upon him to appear before this Court as a witness in the case of the United States vs. Harry F. Sinclair and

Albert B. Fall, Criminal No 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law.

It is ordered that the Marshal of this District levy upon and seize the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding.

It is further ordered that the Marshal of this District, upon having made such levy and seizure, shall forward to the Consul of the United States at Paris, France, and to the Consuls of the United States at any other place in France, or in any other countries where said H. M. Blackmer may be, a copy of this order with a request that such Consuls, or any one of them, shall make personal service thereof upon said H. M. Blackmer and make prompt return thereof to the Clerk of this Court, and that said Marshal shall make personal service of this order upon said H. M. Blackmer, if he is found in the United States, and make prompt return thereof to the Clerk of this Court, and that said Marshal, upon having made such levy and seizure, shall cause this order to be published in the Washington Evening Star, a newspaper of general circulation in the District of Columbia, once a week for six consecutive weeks, commencing as soon as possible after such levy and seizure, and cause the editor or publisher of such newspaper to make due return thereof upon the completion of such publication.

JENNINGS BAILEY,
Judge.

Dated July 6th, 1928.

Approved:

LEO A. ROVER,
United States Attorney for the District of Columbia.

OWEN J. ROBERTS,
ATLEE POMERENE,
Special Counsel.

16 *Alias Order to Show Cause.*

Filed Dec. 26, 1928.

* * * * * * *

Upon motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 25th day of February 1929, at 10 o'clock A. M. and show cause, if any he has, why he the said H. M. Blackmer, should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpœna heretofore issued by said Court and served upon him to appear before this Court as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law.

It is ordered that the Marshal of this District levy upon and seize the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding.

It is further ordered that the Marshal of this District, upon having made such levy and seizure, shall forward to the Consul of the United States at Paris, France, and to the Consuls of the United States at any other place in France or in any other countries where said H. M. Blackmer may be, a copy of this order with a request that

17 such Consuls, or any one of them, shall make personal service thereof upon said H. M. Blackmer and make prompt return thereof to the Clerk of this Court and that said Marshal shall make personal service of this order upon said H. M. Blackmer, if he is found in the United States and make prompt return thereof to the Clerk of this Court, and that said Marshal, upon having made such levy and seizure, shall cause this order to be published in the Evening Star, a newspaper of general circulation in the

District of Columbia, once a week for six consecutive weeks, commencing as soon as possible after such levy and seizure and cause the editor or publisher of such newspaper to make due return thereof upon the completion of such publication.

WILLIAM HITZ,
Judge.

Dec. 26, 1928.

Approved:
LEO A. ROVER,
United States Attorney for the District of Columbia.
ATLEE POMERENE,
Special Counsel.

18 *Proof of Publication.*

Filed Sep. 16, 1929.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Elmer F. Yount, a Notary Public in and for the District of Columbia, aforesaid, W. R. Little, who being duly sworn according to law, on oath says that he is the Agent and Auditor of The Evening Star, a daily newspaper published in the City of Washington, District of Columbia, and that the advertisement, of which the annexed is a true copy, was published in said newspaper six times on the following dates: January 8, 15, 22, 29, 1929; February 5, 12, 1929, at a cost of seventy-seven 40/100 (77.40) Dollars.

W. R. LITTLE.

Sworn and subscribed to before me Feb. 14, 1929.
[SEAL.] ELMER F. YOUNT,
Notary Public.

(See alias order to show cause of December 26, 1928.)

By virtue of the foregoing alias order issued out of the Supreme Court of the District of Columbia in the case of the United States vs. Harry M. Blackmer in Contempt No. 18, I have this 7th day of January, 1929, levied upon and

seized and taken into my custody securities to the value of $100,000, being the property of the said Harry M. Blackmer, and I hereby give notice to the said Harry M. Blackmer to be and appear before the Supreme Court of the District of Columbia on or before Fedruary 25, 1929, at 10 o'clock a. m., as admonished in said alias order; and I further give notice that the securities levied upon and seized by me will be held "until further ordered by the court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding". (Signed) Edgar C. Snyder, United States Marshal in and for the District of Columbia.

DISTRICT OF COLUMBIA:

In the Supreme Court of the District of Columbia.

Schedule of Levy Under

$100,000 U. S. First Liberty Loan 3½% bonds callable at the option of the United States on or after June 15, 1932, due June 15, 1947, with December 15, 1927, and subsequent coupons attached.

95 bonds at $1,000 each, numbered 5806, 5807, 5808, 5809, 22933, 41257, 41258, 41259, 41260 41261 41262, 41263 41264, 41265, 41266, 41282, 50976, 91659, 96417, 96418, 96420, 96421, 96422, 107930, 196887, 267999, 268153, 268154, 460999, 509626, 509627, 509628, 509629, 509630, 509631, 509632, 509633, 509634, 614071, 614072, 614073, 631401, 614074, 614075, 631402, 720213, 720214, 720215, 720216, 720217, 720218, 720219, 720220, 750021, 750022, 750023, 750024, 750025, 750026, 750027, 843080, 860308, 860309, 860310, 860312, 888351, 888352, 888353, 888354, 888355, 888356, 888357, 888358, 888359, 888699, 888700, 1005452, 1005453, 1005454, 1005455, 1005456, 1005457, 1005458, 1005459, 1019999, 1020000, 1020157, 1020158, 1020159, 1020160, 1020443, 1020444, 888702, 888703, 888704.

10 bonds at $500 each, numbered 211054, 211055, 182009, 214940, 265573, 278356, 278362, 282378, 282379, 282618,

We, the undersigned, citizens of the District of Columbia, having been duly summoned and sworn by the Marshal of said District, do hereby certify that we have appraised

the property described in the foregoing schedule at One Hundred Five Thousand Four Hundred Seventy one and 15/100 Dollars.

Given under our hands and seals, this seventh day of January, 1929.

F. A. LIVINGSTONE, [SEAL.]
Assistant Chief, Division of Securities, Treas. U. S.

A. W. TYLER, [SEAL.]
Chief Trust Section, Division Securities, Treas. U. S.

21 Marshal's Return.

I have this 7th day of January, 1929, executed the within order in the case of United States vs. Harry M. Blackmer by levying upon and seizing One Hundred Thousand ($100,000) Dollars in United States First Liberty Loan Bonds at the par value of $100,000, the property of the said defendant, Harry M. Blackmer.

EDGAR C. SNYDER,
U. S. Marshal in and for the District of Columbia.

Jan. 7, 1929.

Attached as per schedule.

E. C. SNYDER,
U. S. Marshal in and for Dist. of Columbia.

Return of Service.

Served a true copy of the within order on the within-named Harry M. Blackmer by delivering said true copy personally to him on the 21st day of January, 1929, at Paris, France.

GEORGE ORR,
Consul of the United State at Paris, France.

744.
No fee prescribed.

Motion to Vacate Order of December 26, 1928, & Proceedings, &c.

Filed Feb. 25, 1929.

* * * * * * *

And now come Nathan L. Miller and George Gordon Battle, attorneys for Harry M. Blackmer, appearing specially for the purposes of this motion only, and move this Honorable Court to vacate and set aside the order herein of this Honorable Court, dated December 26, 1928, and all proceedings pursuant thereto, on the ground that this Honorable Court has not jurisdiction of said Blackmer and has not jurisdiction of this proceeding, for the following reasons, among others, viz:

22 (1) That said order and all proceedings pursuant thereto and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835), pursuant to which said order was made and said proceedings had, are void because in conflict with the following provisions of the Constitution of the United States, viz:

(*a*) The Fifth Amendment, providing that no person shall be deprived of life, liberty, or property without due process of law;

(*b*) The Fourth Amendment, providing that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizure, shall not be violated;

(*c*) The Eighth Amendment, providing that excessive fines shall not be imposed, nor unusual punishments inflicted;

(*d*) The Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation;

(*e*) The Sixth Amendment, providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury;

(*f*) The Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.

Wherefore the undersigned move this Honorable Court to issue an order vacating and setting aside said order,

dated December 26, 1928, and vacating and setting
23 aside any purported service thereof on said Blackmer by delivery of a copy thereof to him personally in France and/or by publication thereof in the Washington Evening Star pursuant to said order, and directing the immediate release of said Blackmer's property within the United States heretofore levied upon or seized by the Marshal, pursuant to said order, viz, One Hundred Thousand Dollars par value of First Liberty Loan Bonds;

And the undersigned further move this Honorable Court to extend the time for answer in this proceeding until twenty days after final determination of the foregoing motion.

This motion is made upon the proceedings heretofore had herein and upon the annexed affidavit of George Gordon Battle, verified February 23, 1929, and the affidavit of Harry M. Blackmer, verified January 2, 1928.

Dated February 23, 1929.

NATHAN L. MILLER,
GEO. GORDON BATTLE,
Attorneys for Harry M. Blackmer, Appearing Specially for the Purposes of This Motion Only.

Affidavit in Support of Motion to Vacate Order and Proceedings.

• • • • • • •

STATE OF NEW YORK,
County of New York, ss:

George Gordon Battle, being duly sworn, deposes and says:

I am one of the attorneys for Harry M. Blackmer in this proceeding, appearing specially for the purposes of
24 the above mentioned motion only. I have acted as attorney for Mr. Blackmer in various matters during a number of years last past, and I am familiar with his affairs.

A previous contempt proceeding was instituted against the said Harry M. Blackmer and an order to show cause

why he should not be punished therein was made by this Court and dated November 16, 1927. A motion to vacate and set aside the said order and all proceedings pursuant thereto on the ground that the Honorable Court had no jurisdiction of the said Blackmer and had no jurisdiction of the proceeding, for the reason that the order and all proceedings thereon are void, because in conflict with the Fifth, Fourth, Eighth and Sixth Amendments to the Constitution of the United States, was duly made in the said first contempt proceeding and was argued on March 3, 1928, which motion was thereafter denied. Upon the return of said motion to vacate the said first named contempt proceedings, Mr. Blackmer filed his affidavit, verified January 2, 1928, in the City of Paris, in the Republic of France, copy of which is attached to this affidavit, the original being on file with this Court. Reference is made to the original with the same force and effect as if it were filed herewith and the Court is asked to take the copy hereto attached in lieu of such original, such original being on file with this Court. In the affidavit of Mr. Blackmer, it is stated:

"In the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere. Since 1924 the affiant has had no regular place of business in the United States of America, and such business affairs as he had in America have been handled chiefly by his attorneys in the City of New York, State of New York."

25 I know of my own knowledge that the same condition still continues. I went abroad and saw Mr. Blackmer there. I know he has not been in this country since 1926. On information and belief, therefore, as well as from my personal knowledge, I state that since 1926 he has at all times resided abroad, spending his time in England, in France and elsewhere.

Furthermore, upon the return of the argument of the motion to vacate the order to show cause in the first contempt proceeding, it was said:

"The Court: From your point of view this question of

whether he has a permanent residence abroad is immaterial?

Mr. Pomerene: Entirely immaterial and entirely irrelevant in our judgment.

The Court: Governor Miller asked whether or not it will be considered a controverted fact as to his residence abroad.

Mr. Pomerene: We are going to hear this motion on the record as it is. We are not controverting that fact. We do not concede it at all, but we are not in a position to controvert it at the present moment.

The Court: You are ready to go on with the motion?

Mr. Pomerene: We are.

Mr. Miller: I am quite willing to go on on that assumption. We do not ask for a concession. I simply wish to know that the point is not controverted."

It appears, therefore, that the question of Mr. Blackmer's residence abroad is not controverted.

GEORGE GORDON BATTLE.

Sworn to before me this 23rd day of February, 1929.

[SEAL.] EDITH M. HARDY,
Notary Public, Westchester Co.

Certificate filed in New York County.
Clerk's No. 27, Register's No. 9011.
Kings Co. Clk. No. 1, Reg. No. 9012.
Commission expires March 30, 1929.

26 CITY OF PARIS,
Republic of France, ss:

On this 2nd day of January 1928 personally appeared before me Henry M. Blackmer, who, being duly sworn, deposes and says that he was born in the City of Worcester, State of Massachusetts, United States of America; that for a period of over ten years up to and including 1923, he was a resident of the City of Denver, State of Colorado, United States of America, having his home in that City, and was actively engaged in business there; that for some years prior to 1923 he was the President and later the Chairman of the Board of Directors of the Midwest Refining Company, a Colorado corporation engaged in the oil business;

that in the year 1924 he left the City of Denver, State of Colorado, United States of America, resigning his position as Chairman of the Board of Directors of the Midwest Refining Company, and retired from business, taking up his residence at Hotel Plaza Athenée, in the City of Paris, France (although retaining his American citizenship): that thereafter and in the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the said City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere. Since 1924 the affiant has had no regular place of business in the United States of America, and such business affairs as he had in America have been handled chiefly by his attorneys in the City of New York, State of New York.

HENRY M. BLACKMER.

27 Sworn to and subscribed before me this 2nd day of January, 1928.

[SEAL.] BENJAMIN H. CONNOR,
A Commissioner for the State of New York.

Order Continuing Hearing.

Filed Feb. 25, 1929.

Come now the parties hereto, by their representative attorneys of record (the attorneys for the Respondent Harry M. Blackmer appearing specially for the purpose of the motion only) and now, this 25th day of February, A. D. 1929, before Mr. Justice Siddons, attorneys for the respondent move for a postponement of the hearing on the rule to show cause heretofore made returnable on February 25th, 1929, to a later date, and further having filed a motion to vacate the order of this court dated December 26th, 1928, and the said motion for postponement having been heard and considered, it is, for good cause shown,

Ordered that the hearing on said motion and the hearing on the rule to show cause be, and the same hereby are postponed to the 25th day of March, A. D. 1929, at 10 o'clock a. m.

F. L. SIDDONS,
Justice.

28 *Order Continuing Hearing.*

Filed Mar. 25, 1929.

* * * * * * *

Come now the parties hereto, by their respective attorneys of record (the attorneys for the Respondent Harry M. Blackmer appearing specially for the purpose of the motion only) and now, this 25th day of March, A. D. 1929, before Mr. Justice Stafford, attorneys for the respondent move for a postponement of the hearing on the rule to show cause heretofore made returnable on Feb. 25th, 1929, to a later date, and further having filed a motion to vacate the order of this court dated December 26th, 1928, and the said motion for postponement having been heard and considered, it is, for good cause shown,

Ordered that the hearing on said motion and the hearing on the rule to show cause be, and the same hereby are postponed to the 25th day of April, A. D. 1929, at 10 o'clock, a. m.

WENDELL P. STAFFORD,
Justice.

Order Continuing Hearing.

Filed Apr. 25, 1929.

* * * * * * *

Come now the parties hereto, by their respective attorney of record (the attorneys for the Respondent Harry M. Blackmer appearing specially for the purpose of the motion only) and now, this 25th day of April, A. D. 1929, before Mr. Justice Siddons, attorneys for the respondent move for a postponement of the hearing on the rule to show cause

29 heretofore made returnable on Feb. 25th, 1929, to a later date, and further having filed a motion to vacate the order of this court dated December 26th, 1928, and the said motion for postponement having been heard and considered, it is, for good cause shown,

Ordered that the hearing on said motion and the hearing on the rule to show cause be, and the same hereby are postponed to the 25th day of May, A.D. 1929, at 10 o'clock a. m.

F. L. SIDDONS,
Justice.

Decree.

Filed June 6, 1929.

* * * * * * *

This cause coming on to be heard on the motion of the defendant to vacate and set aside the order of this Court, dated December 26, 1928, and all proceedings pursuant thereto and having been submitted to the Court, it is by the Court this 6th day of June, 1929,

Adjudged, ordered and decreed that the said motion to vacate and set aside the order of this Court, dated December 26, 1928, and all proceedings pursuant thereto, be and the same is hereby, overruled; and the defendant, Harry M. Blackmer, is hereby given twenty (20) days in which to file his answer in the above entitled proceeding.

F. L. SIDDONS,
Justice.

30 *Plea.*

Filed Sept. 9, 1929.

* * * * * * *

Whereas heretofore Nathan L. Miller and George Gordon Battle, attorneys for the defendant, appearing specially for that purpose only moved this Honorable Court to vacate and set aside the Order to Show Couse herein dated December 26, 1928, and all proceedings pursuant thereto on the ground that this Honorable Court had not and has not jurisdiction of the defendant nor jurisdiction of this proceeding, for the reason and upon the gruonds mentioned in said motion, and in particular moved this Honorable Court to vacate and set aside the purported service herein of said Order to Show Cause on defendant while in Paris, France, pursuant to the terms of said order, and to direct the release of his property within the United State heretofore levied upon or seized or attempted to be levied upon or seized by the Marshal pursuant to said order; and

Whereas said motion was made upon the proceedings theretofore had herein and upon the affidavit of said George Gordon Battle thereto annexed, verified February 23, 1929, and the affidavit of defendant, verified January 2, 1928, and

Whereas the said motion duly came on to be heard and, by order dated June 6, 1929, this Honorable Court over-

ruled and denied the said motion and gave defendant twenty days in which to file his answer herein; and defendant and his attorneys believe this Honorable Court has not jurisdiction of defendant or of this proceeding, and that said motion should accordingly have been granted;

Now, therefore, defendant by his undersigned at-
31 torney, appears and answers herein under protest, pursuant to said order of June 6, 1929, reserving all his claims and rights in and under the said motion and the proceedings had thereon; and subject to such protest and reservation, for his plea to the charge contained in the Petition for Order to Show Cause heretofore filed on behalf of the United States, pursuant to which said Order to Show Cause of December 26, 1928, was issued, answers the allegations of said petition as follows:

1. Answering paragraph 1 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on or about the 9th day of January, 1928, E. A. Rover, (sic) United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, presented their petition to this Honorable Court for the issuance of subpœnas (hereinafter referred to as said Petition for Subpœnas) directed to defendant, who was and is a citizen of the United States, to appear before this Honorable Court on Monday, April 2, 1928, as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Honorable Court, and that said Petition for Subpœnas now appears of record therein.

(*b*) Denies that said Petition for Subpœnas was presented to this Honorable Court in accordance with the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) (hereinafter referred to as "said Act of Congress") and denies that said Petition for Subpœnas was in accordance with said Act of Congress.

(*c*) Alleges that said Petition for Subpœnas
32 shows on its face that it was and is wholly invalid as a showing for the issuance of subpœnas directed to defendant in accordance with said Act of Congress, for the reason that all allegations therein contained pretending to constitute such showing are not based upon facts but upon mere unsupported, unverified beliefs of the petitioners.

(*d*) Alleges that said Petition for Subpœnas expressly admits that defendant is beyond the jurisdiction of the United States.

(*e*) Alleges that the presentation of and the action of this Honorable Court on said Petition for Subpoenas were entirely ex parte; that defendant was afforded neither due notice thereof nor due opportunity to be heard therein;

Alleges that defendant never received said Petition for Subpœnas, or a true copy or due notice thereof, pursuant to said Act of Congress, or to any order of this Honorable Court, or to any lawfully authorized action of any person whomsoever, in or in connection with the proceedings, of any of them, alleged or prayed for in said Petition for Order to Show Cause.

2. Answering paragraph 2 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on the 9th day of January 1928, this Honorable Court made an order based upon the said Petition for Subpœnas for the issuance of the subpœnas therein prayed for, and that on the 12th day of January, 1928, alleged subpœnas were issued directed to the Consuls of the United States and (sic) foreign countries for service upon defendant.

(*b*) Denies that subpœnas were duly issued;

33 Denies that said alleged subpœnas were duly issued in accordance with the terms of said Act of Congress and/or in accordance with the said order of this Honorable Court.

(*c*) Alleges that the alleged subpœnas referred to in paragraph 2 of said Petition for Order to Show Cause and therein alleged to have been issued on the 12th day of January, 1928, were in form as follows, to wit:

Supreme Court of the District of Columbia.

No. 43324, Criminal Docket.

THE UNITED STATES

vs.

HARRY F. SINCLAIR and ALBERT B. FALL.

The President of the United States to —— ——:

You are hereby commanded to attend the said court on Monday, April 2nd, 1928, at ten o'clock A. M., to testify

on behalf of the United States, and not depart the Court without leave of the Court or District Attorney.

Witness the Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928.

[Seal of the Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,

(Signed) By —— ——,
Assistant Clerk.

3. Answering paragraph 3 of said Petition for
34 Order to Show Cause, defendant:

(*a*) Admits the allegations therein contained.

4. Answering paragraph 4 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that the amount to be tendered to each of the witnesses referred to in said order of this Honorable Court (based upon said Petition for Subpœnas) for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court, was by said order fixed and determined at $500.00.

(*b*) Denies each and every other allegation therein contained.

5 Answering paragraph 5 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that on the first day of February, 1928, George Orr, at Paris, France, exhibited and read to defendant an alleged subpœna in form and substance as set out in Exhibit "A" attached to said Petition for Order to Show Cause, and left with defendant, at Paris, France, a duplicate copy thereof; admits that said George Orr at the same time tendered to defendant the sum of Five Hundred Dollars ($500.00) in currency of the United States of America and that defendant refused to take the said moneys or any part thereof.

(*b*) As to the allegations that said George Orr was a Consul of the United States at Paris, France, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

(*c*) Denies that the matters and things done alleged in paragraph 5 of said Petition for Order to Show
35 Cause, or any of them, constitute due or lawful service of one of said alleged subpœnas upon defendant in Paris, France, on February 1, 1928, or at any other time, or that said alleged matters and things done, or any of them, had any legal force or effect.

Denies that said alleged subpœna ever had any legal force or effect at Paris, France, or elsewhere.

(*d*) Alleges that at the time of said alleged service of said alleged subpœna defendant refused to accept the same;

Alleges that in tendering said Five Hundred Dollars ($500.00) to defendant, said Orr did not inform defendant that the same was for his necessary expenses in traveling to and from the place at which this Honorable Court sits and/or for his expenses in attendance thereat.

(*e*) Alleges that said alleged subpœna was not issued or served under the authority of said Act of Congress, or pursuant to any order of this Honorable Court under said Act of Congress; alleges that said alleged subpœna contained no notice to defendant that it was issued under authority of said Act of Congress and/or pursuant to any order of this Honorable Court; that neither the original nor a true copy of said Petition for Subpœnas, or said Order for Subpœnas, was served as a part of or in connection with or to accompany said alleged service of said alleged subpœna; that no due or lawful notice of any kind was ever furnished defendant that said subpœna was issued and/or was served under authority of said Act of Congress and/or pursuant to any order of this Honorable Court.

36 6. Answering paragraph 6 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that said George Orr made to the Clerk of this Honorable Court a pretended return of said alleged service of said alleged subpœna and of the alleged tender of said money, as appears of record in said cause (The United States vs. Harry F. Sinclair and Albert B. Fall, No. 43,324, Criminal Docket); admits that a true copy of said alleged subpœna and of said alleged return thereof are attached to said Petition for Order to Show Cause, marked Exhibit "A" therein, and are made a part of said Petition for Order to Show Cause.

(*b*) As to the allegation that "said consul" made said pretended return of said alleged service and of said alleged tender, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

(*c*) Denies that said pretended return of said alleged service and/or said alleged tender, was due or lawful or that the same had or has any legal force or effect.

(*d*) Alleges that said pretended return on its face shows that it was not due or lawful in that it shows that defendant did not receive due or lawful notice that said alleged subpœna and/or said alleged tender was pursuant to said Act of Congress; and that defendant did not receive due or lawful notice that said moneys tendered were for defendant's necessary expenses in traveling to and from the place at which the Honorable Court sits and for defendant's expenses in attendance thereat.

(*e*) Alleges that the affidavit of service required by paragraph 3 of Law Rule 19 of this Honorable Court was not made.

37 7. Answering paragraph 7 of said Petition for Order to Show Cause, defendant:

(*a*) Admits the allegations therein contained.

(*b*) Alleges that said case (The United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43,-324) was not called for trial on April 2, 1928, and that defendant did not receive due or lawful notice that the trial of said case was continued to April 9, 1928; that there were no proceedings in said case on Monday, April 2nd, 1928, at ten o'clock a. m., or at any other time on that day; that defendant could not have testified in said case on April 2, 1928, on behalf of the United States, or otherwise, had he then appeared in response to said subpœna; that defendant was not called as a witness, or otherwise, in said case or by or on behalf of this Honorable Court, at any time on April 2nd, 1928.

8. Answering paragraph 8 of said Petition for Order to Show Cause, defendant:

(*a*) Admits that the trial of said criminal case No. 43,-324 was commenced in this Honorable Court at ten o'clock a. m. on Monday, April 9, 1928; that said Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, requested this Honorable Court to have the

Clerk call defendant; that this Honorable Court instructed the Clerk to call and the Clerk did call "H. M. Blackmer"; that defendant did not respond to said call and did not appear.

(*b*) Denies that defendant was called "as a witness";

38 Denies that defendant neglected and refused to appear.

(*c*) Alleges that defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday, April 9, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928; that defendant was not lawfully bound to attend the trial of said case on April 2, 1928, on April 9, 1928, or at any other time.

9. Denies each and every allegation in said Petition for Order to Show Cause not hereinafter expressly admitted or denied.

And for a first further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length; and

Alleges that said Order for Subpœnas and the alleged issuance and alleged service of an alleged subpœna and/or subpœnas pursuant thereto, referred to in paragraphs "2," "3," and "5" of the said petition, and the pretended return of such alleged service, referred to in paragraph "6" of the said petition, and the provisions of the Act of Congress of July 3, 1926, C. 762 (44 Stat. 835) pursuant to which said proceedings were alleged to have been taken, were and are null, void and of no force and effect because they are in conflict with the Constitution of the United States, especially the provision of the Fourth Amendment, providing that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated; the Eighth Amendment,

39 providing that excessive fines shall not be imposed, nor unusual punishments inflicted; the Sixth Amendment, providing that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation; the Sixth Amendment, providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury; the Sixth Amendment, providing

that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process of obtaining witnesses in his favor, and of the Fifth Amendment, that no person shall be deprived of life, liberty or property without due process of law.

And for a second further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that said Petition for Order to Show Cause was not verified as required by Law Rule 17 and Equity Rule No. 8 of this Honorable Court.

And for a third further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length. and

Alleges that the said Order to Show Cause herein is too vague and indefinite to be readily understood and to acquaint defendant with the facts constituting the alleged contempt therein referred to, in the following particulars, to wit:

The subpœna which it is alleged therein defendant neglected, failed and refused to obey, is not sepcified or described except that it is alleged that such subpœna was "heretofore issued" by this Honorable Court and was served upon defendant to appear before this Honorable Court as a witness in the case of The United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324, on the docket of this Honorable Court, the circumstances of which are alleged in said Order to Show Cause to be very fully set out in a certain motion of plaintiff alleged in said order to be filed herein.

Alleges that three pretended subpœnas having relation to said case have come to the attention of defendant—one such subpœna alleged to have been served on defendant by George Orr, at Paris, France, on May 27, 1927; one such subpœna alleged to have been served on defendant by Raymond Davis at Paris, France, on June 7, 1927.—all as appears in the records of this Honorable Court in The United States vs. Harry M. Blackmer, Contempt No. 16,—and one such subpœna alleged to have been served on defendant by said Orr on February 1, 1928, as appears in the said Petition for Order to Show Cause.

Alleges that neither the "motion of plaintiff" referred to in said Order to Show Cause, or a true copy thereof, ac-

companied said Order to Show Cause, or was ever duly or lawfully received in any manner by defendant; and that it is impossible to tell from said Order which "motion of plaintiff" is referred to,—whether the motion for Order to Show Cause appearing in the records of this Honorable Court in The United States of America vs. Harry M. Blackmer, Contempt No. 16, or whether the said Petition for Order to Show Cause in The United States of America vs. Harry M. Blackmer, Contempt No. 18, or whether
41 some other motion or petition.

And for a fourth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that there is nothing in said Order to Show Cause to put the defendant upon due or lawful notice that said Order was issued in accordance with said Act of July 3, 1926, C. 782 (44 Stat. 835); that defendant has never been duly or lawfully informed of the facts constituting his alleged offense herein.

And for a fifth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that there are no grounds shown in said Order to Show Cause or in said Petition for Order to Show Cause why the Marshal of the District of Columbia should be ordered to levy upon and seize the property of defendant within the United States of the amount and value of One Hundred Thousand Dollars ($100,000), or so much thereof as may be found, and to hold the same until further order by this Honorable Court for the purpose of satisfying any judgment that may be rendered against defendant in this proceeding.

And for a sixth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that Order to Show Cause was not accompanied with a copy of said Petition for Order to Show Cause, or an affidavit, or of any notice thereto subscribed; that defendant was not served with said copy; that the pur-
42 ported return of said Order to Show Cause does not show the fact;—all contrary to the provisions of paragraph 1 of Law Rule 19 of this Honorable Court.

And for a seventh further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that said Order to Show Cause was not published in the Washington Law Reporter, as required by paragraph 4 of Law Rule 19, of this Honorable Court.

And for an eighth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that the United States Marshal did not make the seizure or levy of defendant's property ordered in said Order to Show Cause, or as contemplated or authorized by said Act of Congress, or any lawful seizure of or levy upon the property of this defendant; that the pretended levy and seizure of the United States Marshal in and for the District of Columbia made on or in connection with said Order to Show Cause and his pretended return thereon appearing in the records of this Honorable Court were upon property all of which had previously been seized and levied upon by said Marshal and which was then being held by him under the orders of this Honorable Court in the United States of America vs. Harry M. Blackmer, Contempt No. 16, for the purpose of satisfying any judgment that may be rendered against defendant in said last-mentioned action; that said property was not subject to seizure in this Contempt No. 18.

43 And for a ninth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that no affidavit in connection with the attachment of defendant's property ordered by said Order to Show Cause was made to comply in statement with the provisions and requirements of Sec. 445 of the Code, as amended by the Act of Congress approved April 19, 1920,—contrary to the provisions of paragraph 1 of Law Rule 9 of this Honorable Court.

And for a tenth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that the testimony expected from defendant as alleged in said Petition for Order to Show Cause in United States of America vs. Harry F. Sinclair and Albert B. Fall,

Criminal Docket No. 43,324, if admissible at all, would have been circumstantial in character and only of inferential, if of any, value; that the direct testimony introduced in said case by the United States through its witness, one M. T. Everhart, covering, among other matters, the same ground expected to be covered by defendant as alleged in the said Petition to Show Cause, would have rendered the expected testimony of defendant inadmissible; that said witness Everhart, and his testimony were available to the United States on the date of said Petition for Subpœnas and at all times subsequent to December 31, 1927; and defendant was so advised and such advice was a factor in his decision not to respond to the said subpœna alleged to have been served upon him.

44 And for an eleventh further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that after the alleged service of the pretended subpœna referred to in paragraph 5 of said Petition for Order to Show Cause, defendant, desiring to perform his legal obligations (if any), obtained opinions in that regard from several attorneys at law of high repute in the United States; that he was advised by each and all of said attorneys after full consideration, that he was not under any such obligation, but that on the contrary, said alleged service and the proceedings purporting to authorize the same, and the provisions of said Act of Congress, were unconstitutional and wholly void and of no force or effect for the reasons hereinbefore mentioned, and relying on such advices defendant did not appear according to the purported demand of said pretended subpœna so allegedly served.

And for a twelfth further plea—

Defendant re-alleges the allegations contained hereinbefore as if here repeated at length, and

Alleges that this action (Contempt No. 18) and United States vs. Harry M. Blackmer, Contempt No. 16, pending before this Honorable Court relate to the alleged refusal of defendant to respond to alleged subpœnas all of identical form except as to the dates of the trial therein referred to; that each of said subpœnas was allegedly requested and issued to elicit from defendant exactly similar testimony as will more fully appear from the petitions for orders to

show cause in said two actions; that all of said al-
45 leged subpœnas purported to command defendant to attend the trial of The United States vs. Harry F. Sinclair and Albert B. Fall, No. 43,324, Criminal Docket; that the first uncompleted trial of said case No. 43,324 Criminal Docket and the completed second trial thereof were on the same indictment; that the contempt alleged in said Contempt No. 16 and that alleged in said Contempt No. 18, are alleged to be contempts of the same court; that at the time of the commencement of proceedings in this Contempt No. 18,—Contempt No. 16 was pending (and is now pending) before this Honorable Court, and attorneys for defendant, appearing specially for the purpose, had filed pleadings and had made showing therein in defense of what is in substance the same charge as that alleged in this Contempt No. 18; that this proceeding is an attempt to inflict double punishment upon defendant for what is in fact and substance but one offense, if any.

Wherefore defendant prays judgment that he is not guilty of contempt of Court, as charged in said Petition for Order to Show Cause, and directing the release of his property within the United States, heretofore seized or claimed to have been seized by the Marshal purporting to act pursuant to said Order to Show Cause, to wit: $100,000 par value of First Liberty Loan Bonds and that this proceeding be dismissed.

GEO. GORDON BATTLE,
Attorney for Defendant,
Appearing as Hereinbefore Stated.

Dated September 7, 1929.

46 *Demurrer.*

Filed Sep. 12, 1929.

* * * * * * *

And now comes the United States, by its attorneys, Leo Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and demurs to sub-paragraph *e* of the 6th paragraph of the defendant's First Plea, and also demurs to the defendant's First Fur-

ther Plea, Second Further Plea, Sixth Further Plea, Seventh Further Plea, Eighth Further Plea and Ninth Further Plea, and says that the said Pleas are bad in substance.

LEO A. ROVER,
United States Attorney.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

NOTE.—Among the matters of law intended to be argued in support of the foregoing Demurrer are the following:

1. The provisions of paragraph 3 of Law Rule 19, the provisions of Law Rule 17 and Equity Rule 8, the provisions of paragraph 1 of Law Rule 19, and the provisions of paragraph 4 of Law Rule 19, all of the Supreme Court of the District of Columbia, are inapplicable to the present contempt proceeding.

2. The Act of July 3, 1926, C. 762 (44 Stat. 835) does not violate in any manner the provisions of the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States or any other provisions thereof.

3. The Act of July 3, 1926, C. 762 (44 Stat. 835), is constitutional and binding upon the defendant.

47 4. The levy and seizure by the United States Marshal of defendant's property under the order of this Honorable Court, which property was then being held by him under a levy and seizure pursuant to the order of this Honorable Court in the United States of America vs. Harry M. Blackmer, Contempt No. 16, was lawful and valid, subject only to the said prior levy and seizure and the lien thereof.

5. The provisions of paragraph 1 of Law Rule 9 of the Supreme Court of the District of Columbia are inapplicable to the present contempt proceeding.

6. The aforesaid Pleas of the defendant are bad for other reasons on their face.

Replication.

Filed Sep. 12, 1929.

* * * * * * *

And now comes the United States, by its Attorneys, Leo Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and for its replication to the allegations of fact contained in sub-paragraph *b* of paragraph 7 and sub-paragraph *c* of paragraph 8 of defendant's First Plea avers as follows:

That the defendant was subpœnaed to appear on Monday, April 2, 1928 at 10 o'clock a. m., to testify on behalf of the United States, and under said subpœna was commanded not to depart the Court without leave of the Court or District Attorney; that the trial of criminal case No. 43,324 was continued by order of this Honorable Court
48 from Monday, April 2, 1928; to Monday, April 9, 1928, that said continuance was ordered in open court and witnesses subpœnaed to appear on Monday, April 2, were commanded by the Court to appear on Monday, April 9, 1928; that had the defendant not neglected, failed and refused to obey the subpœna duly served upon him, and had the defendant appeared in court on April 2, 1928 in obedience to the said subpœna, he would have been duly advised of the continuance and the order of the Court that witnesses subpœnaed to appear on April 2 should appear on April 9, 1928; that the said alleged failure of the defendant to receive due or lawful notice of the continuance is due entirely to the failure, neglect and refusal of the defendant to obey the subpœna duly served upon him; and that the defendant, having been duly subpœnaed to appear as a witness on April 2, 1928 and having thereby been commanded not to depart the Court without the leave of the Court or District Attorney was lawfully bound to attend the trial of said criminal case on April 2, 1928 and any postponed date thereof unless and until excused or discharged by the Court or District Attorney, and that the defendant was never so excused or discharged by Court or District At-

torney on April 2, or April 9, 1928, or at any other time or date.

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

49 *Joinder of Issue.*

Filed Sep. 12, 1929.

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And now comes the United States, by its attorneys, Leo Rover, United States Attorney for the District of Columbia, and Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, and joins issue with the defendant upon the allegations of fact contained in paragraphs 1, 2, 4, 5, sub-paragraphs *a*, *b*, *c* and *d* of 6, and sub-paragraph *b* of 8, of the defendant's First Plea; and also joins issue with the defendant upon the allegations of fact contained in the defendant's Third Further Plea, Fourth Further Plea, Fifth Further Plea, Tenth Further Plea, Eleventh Further Plea and Twelfth Further Plea.

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
R.
OWEN J. ROBERTS,
Special Counsel.

Memorandum.

September 16-17.—Hearing of cause. Argument and Trial.

Motion of Defendant on Pleadings for Judgment.

Filed Dec. 30, 1929, (as of) Sep. 16, 1929.

* * * * * * *

The defendant herein, by his attorneys appearing especially for that purpose only, having moved this Court
50 to vacate and set aside the Order to Show Cause herein, dated December 26, 1928, and all proceedings

pursuant thereto on the ground that this Court had not and has not jurisdiction of the defendant or jurisdiction of this proceeding for the reason and upon the grounds mentioned in said motion and by order dated June 6, 1929, this Court having overruled and denied the said motion and giving the defendant leave to file his answer herein, and the defendant having filed his plea under protest pursuant to said order of June 6, 1929, reserving all his claims and rights in and under the said motion and the proceedings had thereon, and the United States Attorney for the District of Columbia and Special Counsel for the United States of America having filed on behalf of the United States a Joinder of Issue and a Demurrer, as appears by the record herein,

"Now, therefore, the said defendant, reserving all his claims and rights under the said motion and the proceedings had thereon and subject to such protest and reservation, moves by his undersigned attorney upon all the pleadings and proceedings herein for judgment that he is not guilty of contempt of court as charged herein and directing the release of his property within the United States heretofore seized or claimed to have been seized by the United States Marshal, and that this proceeding be dismissed upon the following grounds which appear upon the face of the pleadings, proceedings and record herein:

"1. That the petition of January 9, 1928, herein for the issuance of the subpœnas therein described, hereinafter called said Petition for Subpœna, shows on its face that it was and is wholly invalid, as any proper or other showing for the issuance of subpœnas directed to the defendant in accordance with the Act of Congress of July 3, 1926,
51 C. 762 (44 Stat. 835), hereinafter referred to as said Act of Congress, for the reason that all allegations therein contained pretending to constitute such showing, are not based upon facts but upon mere unsupported, unverified beliefs of the petitioners; and the said petition for Subpœnas expressly admits that the defendant is beyond the jurisdiction of the United States and the presentation of and the action of this Court on said Petition for Subpœnas were entirely ex parte; and that the defendant was afforded neither due or any other notice thereon nor due or any other opportunity to be heard therein; and the de-

fendant never received said petition for Subpœnas or any copy thereof or any due or other notice thereon pursuant to said Act of Congress or to any order of this Court or to any lawfully authorized action of any party whomsoever in or in connection with these proceedings or any of them.

"2. The alleged subpœnas directed to the defendant as described in the said Petition for Subpœnas and each of them had nothing on the face thereof to indicate that such subpœnas or either of them were issued or served in any way pursuant to or under the authority of the said Act of Congress, but on the contrary each of the said subpœnas was in the identical form used in this and all other United States Courts before the passage of said Act of Congress and also since the passage of said Act in the usual and ordinary cases in said Court in which the said Act of Congress is not invoked, and therefore the said defendant was not in any way notified by anything that appeared on the face of said subpœna that it was issued under or pursuant to the authority of the said Act of Congress, but on the contrary he was justified in believing on the face of the
52 said subpœna and from all the effects and proceedings connected therewith that the said subpœna was the usual subpœna issued in cases in this and all other United States Courts in which the said Act of Congress is not invoked or concerned; and that by reason of the foregoing the defendant was under no obligation to comply with the direction contained in the said alleged subpœnas.

"3. The alleged service of the said subpœna upon the defendant was wholly illegal, null, void and of no effect, because at the time of such alleged service of said subpœna the proper legal tender was not made to the defendant for his necessary traveling expenses and for his attendance at Court as required by the said Act of Congress, and that the said George Orr, in attempting and pretending to make the alleged tender of $500.00 did not inform the defendant that the same or any part thereof was for his necessary expenses in traveling to and from the place at which this Honorable Court sits and/or for his expenses in attendance thereat.

"4. The said alleged subpœna was not issued or served under the authority of said Act of Congress or pursuant to any order of this Court under said Act of Con-

gress; and said alleged subpœna contained no notice to defendant that the same was issued under authority of the said Act of Congress and/or pursuant to any order of this Court; that neither the original or any copy of said Petition for Subpœnas nor said order for subpœnas was served as a part of or in connection with or to accompany said alleged service of said alleged subpœna; that no due or lawful notice of any kind was ever furnished defendant that said subpœna was issued and/or was served under authority of said Act of Congress or pursuant to
53 any order of this Court.

"5. The said pretended return on its face shows that the said alleged service of said subpœna and/or the said alleged tender was not due or lawful or had any legal force or effect in that the said return shows that the defendant did not receive due or lawful notice that said alleged subpœna and/or said alleged tender was pursuant to said Act of Congress and the defendant did not receive due or lawful notice that said moneys alleged to have been tendered by said Orr were for defendant's necessary expenses in traveling to and from the place at which this Honorable Court sits and for defendant's expenses in attendance thereat:

"6. The affidavit of service required by Paragraph 3 of Law Rule 19 of this Court was not made.

"7. The said case (United States v. Harry F. Sinclair and Albert B. Fall, Criminal Docket #43324) was not called for trial on April 2, 1928 and the defendant did not receive due or lawful notice that the trial of said case was continued to April 9, 1928; there were no proceedings in said case on Monday, April 2, 1928 at 10 o'clock a. m. or at any other time on that day; the defendant could not have testified in said case of April 2, 1928 on behalf of the United States or otherwise had he then appeared in response to said subpœna. The defendant was not called as a witness or otherwise in said case or by or on behalf of this Honorable Court at any time on April 2, 1928; that defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday, April 9, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928; that defendant was not lawfully bound to attend the trial of said cause

on April 2, 1928, on April 9, 1928, or at any other
54 time.

"8. The said order for Subpœnas and the alleged issuance and alleged service of the alleged subpœna pursuant thereto and the said pretended return and the provisions of the said Act of Congress pursuant to which said proceedings were alleged to have been taken and each and all of the proceedings were and are null, void and of no force and effect because they are in conflict with the Constitution of the United States, especially the provisions of the Fourth Amendment providing that the right of the people be secure in their persons, houses, papers and effects against unreasonable seizures, shall not be violated; the Eighth Amendment providing that excessive fines shall not be imposed, nor unusual punishments inflicted; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusations; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right of trial by jury; the Sixth Amendment providing that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor; and the Fifth Amendment providing that no person shall be deprived of life, liberty or property without due process of law.

"9. The Petition for the Order to Show Cause herein was not verified as required by Law Rule 17 and Equity Rule 8 of this Court and also the said Petition was insufficient to justify the issuance of the Order to Show Cause.

"10. The said Order to Show Cause was and is too vague and indefinite to be readily understood and/or to acquaint
the defendant with the facts constituting the alleged
55 contempt therein referred to in the following particulars; to wit, the subpœna which it was alleged therein defendant neglected, failed and refused to obey is not specified or described except that it is alleged that such subpœna was 'heretofore issued' by this Honorable Court and was served upon defendant to appear before this Honorable Court as witness in the case of the United States v. Harry F. Sinclair and Albert B. Fall, Criminal #43324 on the Docket of this Honorable Court, the circumstance of which are alleged in said Order to Show Cause to be very

fully set out in a certain motion of plaintiff alleged in said order to be filed herein; four pretended subpœnas having relation to said case have come to the attention of defendant—one such subpœna alleged to have been served on defendant by George Orr at Paris, France, on May 27, 1927; —one such subpœna alleged to have been served on defendant by Raymond Davis at Paris, France, on June 7, 1927;—one alleged subpœna having been received by defendant commanding his appearance at this Court on the sixteenth day of January, 1928; and one subpœna alleged to have been served on defendant by said Orr on February 1, 1928; neither the 'motion of plaintiff' referred to in said Order to Show Cause or any copy thereof accompanied said Order to Show Cause or was ever duly or lawfully received in any manner by defendant; and it is impossible to tell from said order which 'motion of plaintiff' is referred to—whether the motion for Order to Show Cause appearing in the records of this Honorable Court in the United States of America v. Harry M. Blackmer, Contempt No. 16, or whether the Petition for Order to Show Cause in the United States of America v. Harry M. Blackmer, Contempt No. 18, or whether some other motion of plaintiff.

"11. Neither the said petition considered by this
56 Court as aforesaid, whatever it may have been, for the Order to Show Cause, nor any copy thereof, nor any other petition of Counsel above named for the United States or any of them accompanied said Order to Show Cause or was ever duly or lawfully received in any manner by the defendant.

"12. There is nothing in said Order to Show Cause to put the defendant upon due or lawful notice that the said Order to Show Cause was issued in accordance with said Act of Congress, and the defendant has never been duly or lawfully informed of the facts constituting his alleged offense herein.

"13. There are no grounds shown in said Order to Show Cause or in said petition for Order to Show Cause why the Marshal of the District of Columbia should be ordered to levy upon or seize, or why the said Marshal did make an alleged levy upon and seizure of the property of the defendant within the United States of the amount and value of $100,000.00 and/or to hold the same for the purpose of

satisfying any judgment that may be rendered against defendant in this proceeding.

"14. The said Order to Show Cause was not accompanied with a copy of said petition for Order to Show Cause or an affidavit or any notice thereto subscribed; the defendant was not served with any such copy; that the purported return of said Order to Show Cause does not show the fact—all contrary to the provisions of Paragraph 1 of Law Rule 19 of this Court.

"15. The said Order to Show Cause was not published in the Washington Law Reporter as required by Paragraph 4 of Law Rule 19 of this Court.

"16. The United States Marshal did not make the
57 seizure of levy of defendant's property ordered in said Order to Show Cause or as contemplated or authorized by said Act of Congress or any lawful seizure of or levy upon the property of this defendant; the pretended levy and seizure of the United States Marshal in and for the District of Columbia made on or in connection with said Order to Show Cause and his pretended return thereon appeared in the records of this Honorable Court were upon the property all of which had previously been seized and levied upon by said Marshal and which was then being held by him under the orders of this Honorable Court in the United States of America against Harry M. Blackmer, Contempt No. 16, for the purpose of satisfying any judgment that may be rendered against defendant in said last-mentioned action; the said property was not subject to seizure in this Contempt No. 18.

"17. No affidavit in connection with the attachment of the defendant's property ordered by said Order to Show Cause was made to comply in statement with the provisions and requirements of Section 445 of the Code, as amended by the Act of Congress approved April 19, 1920—contrary to the provisions of Paragraph 1 of Law Rule 9 of this Honorable Court.

"Wherefore and upon the foregoing grounds, the defendant moves on the pleadings and proceedings herein for judgment that he is not guilty of contempt of Court as charged in said petition for Order to Show Cause and directing the release of his property within the United States heretofore

seized or claimed to have been seized by the United States Marshal and that this proceeding be dismissed.

Dated September 16, 1929.

GEORGE GORDON BATTLE,
Attorney for Defendant,
Appearing as Hereinbefore Stated.

Opinion of Siddons, J.

58 Filed December 30, 1929.

* * * * * * *

The Court: So far as that rule is concerned, of course, it is controlled by the acts of the legislature. We have more than one example where Congress has prescribed what publication shall take place, and we are not following out our rule. Of course, our rules can be displaced at any time by an act of Congress. They have been more than once. Our standing rules do remain the law, provided they are within the competency of this Court, under the general powers conferred upon it by the Congress to make rules. And if our rules, promulgated in pursuance of the authority thus given, are within the scope of the authority conferred by the legislature, they are as much the law to be applied in the court as any statute. When Congress says, for instance, that publications in this classification shall be thus and so, then our rule gives place to the legislative command.

In this case the Walsh act prescribes publication in a newspaper, not in the Washington Law Reporter. Congress had a right to do that, and displace our rule in that regard. I do not think this court would be justified in saying, in view of this detailed language of the statute, "Well, we are going to require some further and additional publication. We are going to require publication in the Paris edition of the New York Herald, or the Paris edition of the New York Times. We will require publication in a paper somewhere else—the original home of the respondent here—and we will require it in the Washington Law Reporter." Congress says that publication in some newspaper is enough, and that was done. So, I do not think there is any merit
59 in that contention.

Very briefly going over the matter, of course, a trial court ought to approach a charge of unconstitution-

ality of an act of Congress with very great caution and care. We are all familiar with certain canons—shall I call them?—that have been laid down with respect to questions involving the constitutionality of an act of the legislature. There are not wanting those who have said—not courts, but textbook writers—that inferior courts, at least, ought never to undertake to declare an act of the legislature unconstitutional, but should pass it on to the reviewing authority. When I say "inferior courts" I am not referring to an inferior court of general jurisdiction, such as this is. Of course, we are inferior to the Court of Appeals, and we are inferior to the Supreme Court of the United States. We are a court of general jurisdiction, and that jurisdiction includes all the normal powers of a state court of original jurisdiction plus all the powers of a Federal circuit court, and the old Federal circuit in its original form, when it was simply a trial court. We have, in addition, a jurisdiction possessed by no other court in the country that I know of, and we exercise it, for no other reason, I suppose, than that we are here in the Nation's Capital, and can review certain appropriate cases of executive action and indirectly, at least, we can stay the hand of the President. I do not mean to say by direct process against the President, although that question, on civil process, has never been finally determined. As to the heads of departments exercising for the President the executive authority he sees fit to confer upon them, plus certain specific authorities that some of the heads of departments exercise by
60 reason of special acts of Congress, this court can hand down an injunction, a writ of prohibition, or the like, and either prevent or coerce appropriate action by heads of departments who, after all, are acting for the Executive, the President of the United States.

This court never hesitates, in a proper case, to declare an act unconstitutional, but it should proceed to the consideration of such contention as to unconstitutionality with great care and caution. If in doubt about the matter this court, I think, ought to sustain the constitutionality of the act and let the reviewing authority determine upon the accuracy or inaccuracy of the court's decision in that regard.

We have before us in this case an unusual piece of legis-

lation, unusual in the sense that, so far as we know, it has no analogous precedent in our legislative history; but that would not make it unconstitutional. It would be a sorry day for us, I think, when new conditions, new problems that occur out of our ever-changing and ever more complicated social order do not require new exercise of powers that we ought to consider, if we can, are within the constitutional competency of that branch of the government that may be undertaking to act in a given case.

Now, in this case, I am obliged to say to counsel for the respondent here that I most certainly consider that among the objections originally made to the constitutionality of this act by him was the claim, or the contention, that in terms, apparently, this Walsh act did not confer the same rights upon a defendant in a criminal case as it gives to the prosecution. I distinctly remember the able brief that was filed in behalf of the respondent in that regard, and
61 the equally able reply on that point of the contention.

I think that so far as the constitutionality of this act is concerned, this court remains in the same position as it was before. Counsel for the respondent should look for any correction of that judgment, of course, if it is wrong, to the reviewing court.

As to these other matters, our subpœna, if you will read it carefully, is, in a sense, a command of the President of the United States. It is a command of the President of the United States to the person named as a witness, and it is attested by the Chief Justice of this court. That is the form in which the subpœna is issued, and, so far as I know, it has always been in that same form in criminal cases. All our subpœnas, in detail, run in that way, as I recall it Is not that so, Mr. District Attorney?

Mr. Rover: Yes, your Honor.

The Court: I have here a copy of the subpœna issued in this case.

Mr. Roberts: It is Exhibit A of the petition.

The Court: It is just as I recall:

"The President of the United States to H. M. Blackmer, Paris, France:

"You are hereby commanded to attend the said court," and so forth.

The President of the United States is commanding this respondent to attend this court in a case the title of which is set forth, the United States on the one hand, and two defendants on the other. The case is identified by the number of the criminal docket, and the case is identified as effectually as I think it could be identified. The President of the
62 United States commands Blackmer to attend this court on Monday, April 2, 1928, at ten o'clock a. m., to testify on behalf of the United States "and not depart the Court without leave of the Court or District Attorney.

"Witness, The Honorable Walter I. McCoy, Chief Justice of said Court, January 12, 1928."

The seal of the court is attached, and the clerk, or his deputy, signed it.

Now, then, what intelligent person reading that subpœna could possibly doubt what was expected of him. It was to attend as a witness on behalf of the United States, in a case against the parties named in the title of the suit in the subpœna, to testify on behalf of the United States in this court. He is commanded by the President of the United States to be here on the second day of April, 1928. A copy of that subpœna was served upon him. The consul's return reads:

"George Orr, summoned personally all, the first day of February, 1928.

"H. M. Blackmer, by exhibiting said subpœna personally to the said H. M. Blackmer, reading the same to him and leaving a duplicate copy with him at Paris, France.

"I further certify that pursuant to the order of the court I did at the time of said service tender to the said H. M. Blackmer the sum of five hundred dollars currency of the United States of America, which tender the said H. M. Blackmer then and there refused."

That was the amount declared by this court, acting under specific provisions of the Walsh Act, to be the amount that was regarded as a reasonable one to meet his expenses in coming to the court. Does it require the consular
63 officer to specifically state in his return that the $500 was for that purpose, or was ordered by the court

prior to the issue of the subpœna? To do so would unnecessarily encumber the records of this court with matter that really does not go to the safeguarding of a written summons under these circumsstances at all.

I think I can appropriately say that he could not have supposed that it was a Christmas gift by the President of the United States to him. Probably he had a right to refuse to come unless his mileage was provided, and perhaps his witness fees as well, for the time he would be expected to be in attendance upon this court. I should hesitate very much to hold a person in contempt who, having a subpœna served upon him, said to the officer, "Where are my witness fees? Where is my mileage? Have I got to go from Paris, France, to Washington, D. C. at my own expense?"

It is not suggested that he made any such demand. In the absence of such a demand, the service is perfectly clear. Then contempt proceedings may be predicated on violation of the command of the subpœna, even though the witness fees and mileage were not tendered. There is no suggestion that the witness, in pursuance of his rights, said "Where are my expenses? Where is my mileage, if you are going to drag me from Paris to Washington." He did not do it. There is no suggestion of it. So, I do not think that ground has merit for attack.

Now, as to the notice that this man received of what was going on here, first, he had the command to be here on April 2. It does not make any difference whether he had several other commands to appear on that day. He had this
64 command and he did not obey, according to the record. He did not come in obedience to that command to be here on April 2. What happened on April 2 in the way of continuing the hearing until a later date was none of his concern. He was required to be here on that day, and not to depart until this court or the district attorney gave him permission. He did not come.

Upon his refusal, the fact is made known to this court and an application is made to this court for a rule to show cause.

It is plain here that the application, which took the form of a petition to this court, was not sworn to by counsel. That is not requisite so far as this witness is concerned, so long as he had notice of why he was commanded to be here.

The rule to show cause sets forth:

"Upon the motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 25th day of February, 1929, at 10 o'clock a. m. and show cause, if any he has, why he the said H. M. Blackmer should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpœna heretofore issued by said court and served upon him to appear before this Court as a witness in the case of the United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law."

It is plain that that order does not make specific reference to the facts specifically that required his appearance on April 2. To say that he could have any doubt as to what this order to show cause meant would be to say that he has not the intelligence of a low-grade moron. I do not ascribe anything of the kind to Mr. Blackmer.

Then there is the command to the marshal to levy and seize upon the property of the said H. M. Blackmer "of the amount and value of One Hundred Thousand Dollars ($100,000.00) or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment that may be rendered against H. M. Blackmer in this proceeding."

That was in the nature of security against some penalty or fine that the Court might thereafter impose if it should become satisfied that he had wilfully refused to obey the commands of the rule to show cause. It does not follow that because so much was seized, therefore the fine would be equivalent to what was seized. That would depend upon what was developed at the hearing. There might be some matters of excuse or justification, or at least of mitigation, that would affect materially, perhaps, the judgment of the court in imposng a fine, or the amount of the fine. I do not think there can be any objection to the sufficiency of that. He knew, too, from this rule to show cause, that the marshal had been ordered, this very day, to seize this property, of

the amount and value of one hundred thousand dollars. He knew that.

He knew, too, by this order, that the marshal forwarded to the consul of the United States at Paris, the very consul who had served him with this subpœna, and to the consuls of the United States at any other place in France, or in any other countries where said H. M. Blackmer may be,
66 a copy of this order with a request that such consuls, or any one of them, shall make personal service thereof upon H. M. Blackmer and make prompt return thereof to the Clerk of this Court, and that the marshal was directed to make personal service of this order upon the said H. M. Blackmer, if he is found in the United States, and make prompt return thereof to the Clerk of this Court.

If the contentions of the able counsel for the respondent here are well founded, it would be well nigh impossible in a proceeding of this kind to get a witness who is a citizen of the United States, who happened to be in a foreign country, into this court to testify.

As for notifying them in advance of applications of this kind, it is an invitation to exclude themselves from any such further orders. It is not to be done for a moment. The administration of justice has its practical aspects, based upon a knowledge of human nature, a knowledge of men and women in the United States, their weaknesses and foibles. Of course, it must always proceed within the Constitution. Every citizen has a right to the safeguards accorded him by that great institution.

We have a great many technicalities to deal with here. That word is sometimes abused. Technicalities may be very sound and substantial. The word is often used very loosely. We sometimes hear it said, "Oh, that case was decided on a technicality"—a technicality that may go to the heart of the case.

At any rate, what have we? We have a criminal proceeding pending in this court, United States vs. Fall and
67 Sinclair. A witness, a citizen of the United States, at present absent in a foreign country, has personal knowledge of relevant material in the case thus being prosecuted. By the accumulation of other testimony the government may have proved a charge. Congress has declared in such a case, "Now, Mr. Citizen, when you are needed for

such a purpose by the Government of the United States you must obey subpœnas therein, in obedience to this act."

I cannot discover that there was a single failure to observe the substantial provisions of this act; and that in so doing, Mr. Blackmer was fully informed. To burden and encumber the record with copies of petitions and motions would be unnecessary. It would be easy enough to have very full notice in the rule to show cause. He could have come on, if he wanted to, and he could then read the motion and petition. This Court said "You come here, sir, and meet this charge, a charge stated in the order, for violation of the subpœna served upon you."

No, Mr. Battle. You must convence some other court of the soundness of your position so far as your pending motion is concerned. The motion is overruled.

68 *Decree.*

Filed Oct. 18, 1929.

* * * * * * *

And now, to wit, October 18th, 1929, the above entitled cause having heretofore come on for hearing on September 16th and 17th, 1929, before Siddons, J., upon petition and rule to show cause, plea, joinder of issue, demurrer and replication; and after a full hearing upon the aforesaid pleadings and the proofs and evidence adduced by the petitioner, United States, and the respondent, Harry M. Blackmer, and after full argument by counsel upon the demurrer and all questions of law, the petition that the above named respondent be adjudged in contempt is by the Court sustained and the respondent, Harry M. Blackmer, is accordingly found, adjudged and decreed in contempt of Court; and therefore it is considered, adjudged and decreed by the Court that for his said offense the respondent, Harry M. Blackmer, pay a fine of Thirty Thousand Dollars ($30,000), together with all the taxable costs of this proceeding; and thereupon the said respondent, by his attorneys, notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the Court in this case; whereupon the Court fixes the amount of bond

for costs on appeal at Five hundred dollars ($500.) in the above entitled cause, which said bond shall be expressly conditioned that the property of the respondent (be-
69 ing United States Liberty Bonds of the par value of $100,000) heretofore levied upon and seized by the United States Marshal in Washington, D. C., under the order of December 26, 1928, of this Court, and now held by said Marshal to satisfy any judgment that may be rendered against the respondent in this proceeding, shall remain in the possession and custody of said United States Marshal under said levy and seizure pending the said appeal, and upon the entry of such bond there shall be a stay of proceedings; and in case the judgment appealed from shall be affirmed or the appeal shall be dismissed for any cause, the Court directs that the United States Marshal shall forthwith proceed to sell such of the United States Liberty Bonds of the par value of $100,000, heretofore levied upon and seized under the said order of December 26, 1928, as shall be necessary to satisfy in full the said fine of $30,000., together with all the taxable costs of this proceeding, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

F. L. SIDDONS,
Justice.

Memorandum.

October 21, 1929.—Undertaking on Appeal (supersedeas) $500.00 approved and filed.

November 8, 1929.—Time to file Bill of Exceptions extended to and including November 25, 1929.

70 November 25, 1929.—Proposed Bill of Exceptions filed.

Notice of time of presentation of Bill of Exceptions and acknowledgment of service.

Assignment of Errors of Defendant Harry M. Blackmer.

Filed Dec. 18, 1929.

* * * * * * *

Now comes the defendant, Harry M. Blackmer, and makes the following his assignment of errors in the above entitled cause:

The Court erred:

(1) In overruling and denying on June 6, 1929, the motion (dated February 23, 1929) made by Nathan L. Miller and George Gordon Battle, attorneys for defendant, specially appearing therefor, to vacate and set aside the Order to Show Cause of this Court dated December 26, 1928, and all proceedings pursuant thereto.

(2) In overruling and denying the motion of defendant, made at the trial of said cause and prior to the introduction of any testimony, on all the pleadings and proceedings herein for judgment that he is not guilty of contempt as charged herein and directing the release of his property within the United States heretofore seized or claimed to have been seized by the United States Marshal and that the proceedings be dismissed. (Motion appears at length in transcript of record and is Item 22 on the Designation of Record herein).

(3) In overruling defendant's objection to the taking of any and all testimony in his absence.

(4) In overruling and denying defendant's motion,
71 made at the close of the testimony in chief on behalf of the United States, to dismiss the proceedings on all the grounds theretofore specified (Assignment herein No. 2), and on the ground that the record then made up to date including the pleadings, proceedings and testimony, does not justify any finding of contempt against the defendant.

(5) In sustaining the objection of the United States to defendant's offer to put in evidence the testimony of one M. T. Everhart introduced upon the trial of the Sinclair case (United States vs. Harry F. Sinclair and Albert B. Fall, Criminal No. 43324).

(6) In sustaining the objection of the United States to defendant's proffer of proof that said testimony of said Everhart was available to the United States on the date of the petition for subpœnas, and at all times subsequent to December 31, 1927; and that defendant was so advised, and that such advise was a factor in his decision.

(7) In sustaining the objection of the United States to the relevancy of defendant's proof that the case United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324, was not called for trial on April 2, 1928;

that there were no proceedings in that case on Monday, April 2, 1928, at ten o'clock A. M., or at any other time on that date; that defendant was not called as a witness or otherwise, in said case by or on behalf of this Court at any time on April 2, 1928.

(8) In sustaining the objection of the United States to the relevancy of defendant's proof that defendant was not commanded by the alleged subpœna herein to attend
72 the trial of said case (United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324), on Monday, April 9, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928.

(9) In overruling defendant's objection to the questions by the United States to the witness, George Gordon Battle, during his cross examination, relating to the state of mind of defendant with respect to certain letters rogatory issued to take defendant's testimony in the case of United States of America, Plaintiff v. Mammoth Oil Company, a corporation of the State of Delaware et al. defendants (In Equity 1431—U. S. Dist. Court, District of Wyoming).

(10) In sustaining the objection of the United States to the relevancy of defendant's proof that the first Sinclair trial (United States vs. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324) resulted in a mistrial and that the second trial which followed was upon the same indictment as said first trial.

(11) In overruling and denying defendant's motion made at the close of testimony for both sides that these proceedings be dismissed and the judgment be rendered on behalf of defendant, finding him not guilty of contempt and directing the release of his property, and dismissing these proceedings on each and every ground enumerated in the previous motions. (Assignments herein Nos. 2 and 4).

(12) In overruling defendant's objection to any judgment being rendered in his absence.
73 (13) In declaring and adjudicating defendant to be in contempt of this Court.

(14) In imposing a fine upon defendant of Thirty Thousand ($30,000) Dollars and costs.

(15) In charging the bonds (defendant's) in custodia legis with said fine and costs.

(16) In other respects apparent of record.

GEO. GORDON BATTLE,
Attorney for Defendant.

Service of copy of above Assignments of Error accepted this 18th day of Dec. 1929.

LEO. A. ROVER,
U. S. Attorney, D. C.

Designation of Record.

Filed Nov. 6, 1929.

* * * * * * * *

Now comes Harry M. Blackmer, the appellant in the above entitled cause, and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Petition by attorneys for the United States executed January 9, 1928, for issuance of subpœna to James E. O'Neil and H. M. Blackmer under Act of July 3, 1926, in the case of United States v. Harry F. Sinclair and Albert B. Fall, Criminal No. 43324.

2. Order of January 9, 1928, granting subpœna.

3. Subpœna directed to H. M. Blackmer and return of service and tender by Consul thereon.

4. Petition of United States attorneys filed July 6, 1928, under Act of July 3, 1926, for rule to show cause against H. M. Blackmer why he should not be adjudged in contempt; Marshal to levy on $100,000 worth of property of defendant, including Exhibit A thereto attached.

74 5. Order to show cause dated July 6, 1928, by Bailey, J.

6. Order dated December 26, 1928, requiring defendant to appear February 25, 1929, to show cause why he should not be adjudged in contempt; Marshal ordered to levy on $100,000 worth of property of defendant.

7. Proof of publication.

8. Return of Marshal, attachment $100,000 Liberty Bonds of defendant, with schedule of levy and appraisement attached.

9. Return of Consul endorsed on copy of order of December 26, 1928, to show cause served on defendant January 21, 1929, at Paris, France.

10. Special appearance of Nathan L. Miller and George Gordon Battle for defendant with motion to vacate order of December 26, 1928, and all proceedings thereunder.

11. Affidavits of George Gordon Battle and H. M. Blackmer in support of motion to vacate.

12. Order of Siddons, J., postponing hearing of motion to March 25, 1929.

13. Order of Stafford, J., continuing hearing to April 25, 1929.

14. Order of Siddons, J., continuing hearing to May 25, 1929.

15. Motion of defendant to vacate proceedings overruled and defendant given twenty days to file answer.

16. Plea of defendant.

17. Demurrer of United States to subparagraph (*e*) of paragraph six of defendant's first pleas.

18. Demurrer to defendant's first, second, sixth, seventh, eighth and ninth further pleas.

19. Replication to subparagraph (*b*) of paragraph seven and subparagraph (*c*) of paragraph eight of defendant's first pleas.

20. Joinder in issue to paragraphs one, two, four, five, subparagraphs (*a*), (*b*), (*c*) and (*d*) of paragraph six, and subparagraph (*b*) of paragraph eight of the defendant's first pleas, and upon the allegations of fact contained in the defendant's third, fourth, fifth, tenth, eleventh and twelfth further pleas.

21. Docket entry showing hearing and trial of cause September 16 and 17, 1929.

75 22. Motion of defendant on pleadings for judgment.

23. Opinion of Siddons, J.

24. Decree adjudging defendant in contempt, ordering payment of fine of $30,000 and costs; appeal noted in open court, bond for costs fixed at $500, bonds seized under attachment to remain in custody of Marshal.

25. Undertaking on appeal.

26. Bill of Exceptions.

27. Notice of submission of bill of exceptions for settlement and approval.
28. Memo. bill of exceptions settled and approved.
29. Bill of exceptions.
30. Assignment of errors.
31. This designation of record.

GEO. GORDON BATTLE AND
SHERLEY, FAUST AND WILSON,
Attorneys for Appellant, H. M. Blackmer.

Memorandum.

January 6, 1930.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia, Wednesday, January 15, 1930.

The Court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

76 Now comes here the respondent by his attorney Geo. Gordon Battle, Esquire, and prays the Court to sign and make a part of the record his Bill of Exceptions taken during the trial of the case and submitted to the Court on the 6th day of January, 1930, which is accordingly done, *nunc pro tunc.*

77 —Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 76, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Contempt Cause No. 18, wherein United States is Plaintiff and Harry M. Blackmer is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of January, 1930.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

78 In the Supreme Court of the District of Columbia,
Holding a Criminal Term.

In Contempt. No. 18.

THE UNITED STATES

vs.

HARRY M. BLACKMER.

Amended Bill of Exceptions.

Be it remembered that at the trial of this cause commencing September 16, 1929, and terminating September 17, 1929, before Honorable Frederick L. Siddons, Justice, holding Criminal Court Number 2, proceedings were had and rulings made by the Court and exceptions taken and allowed on behalf of defendant as follows:

There appeared on behalf of the United States Atlee Pomerene and Owen J. Roberts, Esqs., special counsel, and Hon. Leo A. Rover, United States Attorney in and for the District of Columbia. On behalf of defendant, George Gordon Battle, Esq., of New York, New York, and Eugene D. Millikin, Esq., of Denver, Colorado.

Before any evidence was adduced defendant made and filed a motion on pleadings and proceedings for judgment that he is not guilty of contempt as charged in the Petition for Order to Show Cause and directing the release of his property within the United States heretofore seized or claimed to have been seized by the United States Marshal and that the proceedings be dismissed (Motion appears at length in the transcript of record and is item No. 22 of the Designation of Record herein.)

The motion was overruled and denied by the Court, to which ruling exception was duly taken and allowed on be-

half of defendant (Opinion of Siddons, J. overruling and denying this motion appears at length in the transcript of record and is item No. 23 of the Designation of Record herein).

79 Counsel for the United States then proceeded to present testimony on its behalf.

Mr. Roberts: I call your Honor's attention to the fact that paragraph 1 of the plea, subparagraph (*a*), admits presentation of a petition of January 9, 1928, for a subpœna for Blackmer, and admits that Mr. Blackmer is a citizen of the United States.

Mr. Battle: I beg your pardon, I did not catch what you said.

Mr. Roberts: I said that for the convenience of the Court I would like to call his attention to the admissions in your pleading. I will then try to call his Honor's attention to some things of which I shall ask him to take judicial notice, and then I will offer proofs of things as to which he cannot take judicial notice. That is the orderly procedure.

Mr. Battle: Quite right. I object, if your Honor please, to the offer of any proof in the absence of the defendant.

The Court: Overruled.

Mr. Battle: I note an exception.

Mr. Roberts: I call your Honor's attention to the fact that paragraph 2, sub-paragraph (*a*) admits the Court order of January 9th, 1928, for the issuance of subpœnas to Blackmer in foreign parts, and that on the same day subpœnas did issue. I call your Honor's attention to the fact that paragraph 3, sub-paragraph (*a*) admits that the subpœnas commanded Blackmer to appear on April 2, 1928, for the trial of the Fall-Sinclair case, criminal No. 43,324. I call your Honor's attention to the fact that paragraph 4, sub-paragraph (*a*) admits that the Court order of January 9, 1928, provided for the tender to Blackmer of $500 for necessary traveling expenses; and I call attention to the fact that paragraph 5 sub-paragraph (*a*) admits the service of the subpœna on February 1, 1928, by Consul Orr, at Paris, and the tender of $500 by him, and that Blackmer refused the tender.

80 I should say, in connection with that admission, that it admits the service by somebody, but it says in another place that they do not admit that Mr. Orr was the

Consul of the United States at that time, I shall prove it in due course.

I call your Honor's attention to paragraph 6, sub-paragraph (*a*) which admits the return of the service and the return of the fact of tender made by Consul Orr and admits that a true copy of the subpœna and return are attached to the petition as exhibits of the government in its petition for a rule to show cause.

I call attention to the fact that paragraph 7, sub-paragraph (*a*) admits that the trial of the Fall-Sinclair case was continued by the Court to Monday, April 9, 1928.

I call your Honor's attention to the fact that paragraph 8, sub-paragraph——

The Court: Continued on April 2nd?

Mr. Roberts: It does not say. It says continued by order of the Court. Set for April 2nd and continued by order of the Court to April 9th. Paragraph 8 sub-paragraph (*a*) admits the trial of the Fall-Sinclair case commenced on April 9, 1928; that special counsel requested the Court Clerk to call Blackmer. That Blackmer was called and did not respond or appear.

Mr. Roberts: I now ask your Honor to take judicial notice—and, as you do take judicial notice, I merely refresh the memory of the Court by referring to the following matters:

(*a*). The petition of January 9, 1928, signed by your Honor, for the issuance of the subpœna in criminal case 43,324.

(*b*) Your own order, sir, of January 9, 1928——

The Court: I did not understand that. You say the petition signed by me?

Mr. Roberts: No; signed by special counsel. Did I say signed by you? I meant presented to you.

(*b*) The Court order of the same date, signed by your Honor, authorizing the issuance of the subpœna.

81 (*c*) Your Honor's order of July 8, 1928, directing an order to show cause——

The Court: I will take judicial notice of all the papers in the case.

Mr. Roberts: Then I shall not enumerate them. I thought it might be convenient to you to have them right there in their order.

Mr. Roberts: Mr. Quigley will you take the stand please.

Mr. Battle: My objection, if your Honor please, runs to all this testimony. Objection is made to the testimony taken in the absence of the defendant.

The Court: I understand. It is overruled.

Mr. Battle: I wish my objection to be understood as running to all this testimony.

The Court: I understand. You object to any testimony being taken here—proffered by the Government or taken by the Court, in the absence of Mr. Blackmer?

Mr. Battle: Yes.

The Court: You need not repeat the objection, it goes to all that.

Mr. Battle: And I except to the ruling of the Court.

Whereupon **Stephen H. Quigley**, produced as a witness on behalf of the United States, being first duly sworn, was examined and testified as follows:

I am an employee of the Department of State in Washington, as a clerk in the clerical, administrative and fiscal service. It is my duty to keep a register on record showing the appointments of United States Consuls. The records (produced by witness) of the Department show that Mr. George Orr, Consul of the United States was assigned as Consul at Paris on June 6, 1925; that he remained assigned as Consul at Paris until July 2, 1929.

Whereupon **Wilbur J. Carr**, produced as a witness
82 on behalf of the United States being first duly sworn, was examined and testified as follows:

I am an Assistant Secretary of State of the United States; I know Mr. George Orr. Mr. Orr remained a Consul of the United States at Paris, France, from June 6, 1925, until July 2, 1929, to my personal knowledge. I have never heard of another George Orr at Paris, and did not communicate with any other George Orr to procure service of the Blackmer papers. I communicated with the George Orr in question to serve these papers at the request of the Marshal.

Mr. Roberts: The Government rests if your Honor please.

Mr. Battle: If your Honor please, at the close of taking of testimony on behalf of the Government I want to renew

my motion to dismiss the proceeding on all the grounds heretofore specified and on the ground that the record now made up to date, including the pleadings, proceedings, and testimony, does not justify any finding of contempt against respondent. I ask that the proceeding be dismissed on that ground.

The Court: Overruled.

Mr. Battle: I respectfully note an exception.

Counsel for defendant then proceeded to introduce testimony on behalf of defendant.

Mr. Battle: If your Honor please, I call your Honor's attention to the Tenth Further Plea, on page 14, which alleges that the testimony expected from defendant, as alleged in said Petition for Order to Show Cause, in United States of America v. Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43324, if admissible at all would have been circumstantial in character and only of inferential, if of any value; that the direct testimony introduced in said case by the United States through its witness, one M. T. Everhart, covering among other matters the same ground expected to be covered by defendant as alleged in the said petition to show cause, would have rendered the expected testimony of defendant inadmissible;

83 that said witness Everhart and his testimony were available to the United States on the date of said petition for subpœnas and at all times subsequent to December 31, 1927; and defendant was so advised and such advice was a factor in his decision not to respond to the said subpœna alleged to have been served upon him.

The Petition for the Order to Show Cause, which specified the testimony that was expected from the defendant, is in evidence, and I will ask to put in evidence the testimony introduced upon the trial of the Sinclair case, the testimony of M. T. Everhart.

Mr. Roberts: We object, if your Honor please, to the introduction of the testimony in the Sinclair case of M. T. Everhart for the reason that if all matters alleged in that plea were true they would be irrelevant to any issue here. Many a witness is subpœnaed, and when he is actually in court and called is excused because his testimony has been supplied by somebody else. But this plea is full of con-

clusions of law to the effect that because one witness was called, some other witness's testimony would have been inadmissible assuming what the Court would have ruled. Suppose we had to put this witness on the stand and the Trial Judge had said, "In view of something you have put on before, I will not permit this witness to testify." Can the witness refuse to come to court because he thinks that when he gets there some judge will rule that his testimony is inadmissible because of something else, he, the witness, thinks will happen when he gets there; that is that some other witness will be called? That is this proposition, that a witness can set himself up and say, "It is no use for me to go to court, because I understand that when I get there, they are going to call a man named Everhart, and my testimony will be inadmissible. Therefore, I am not going."

The Court: Does it follow that his evidence would have been inadmissible?

Mr. Roberts: No, sir, it would have been cumulative. We had some direct and some circumstantial evidence. It would have been cumulative. Of course, that proposition
84 of law is ridiculous, assuming that it is true that the witness can set himself up and say, "because they will have somebody else there, I will not need to go."

Mr. Battle: Everhart did actually testify.

Mr. Roberts: And in previous proceedings he had refused to testify, and had been sustained. Had we the right to expect that we would get his testimony in this particular trial?

Mr. Battle: After December 31, 1927, that act had been passed which permitted him complete immunity, and from that time on his testimony was available.

Mr. Roberts: I stand on my objection, that it is speculation by the witness as to what will happen when he gets on the trial. He cannot set that up as an excuse for not obeying your Honor's order.

Mr. Battle: I press the offer.

The Court: I think, Mr. Battle, that at the most—and I am not even saying that it is so—the matter undertaken to be set up here might go to some question of mitigation of punishment. It is no answer to the refusal to obey the command to be here.

Mr. Battle: Your Honor sustains the objection?

The Court: Yes.

Mr. Battle: I respectfully except.

I will offer to prove that his testimony was available to the United States on the date of said petition for subpœnas, and at all times subsequent to December 31, 1927; and that the defendant was so advised, and that such advice was a factor in his decision.

Mr. Roberts: I object to that, if your Honor please, on the ground that counsel cannot tell a witness that some other witness will be at the trial, and therefore his client does not need to go.

The Court: I have already overruled it.

Mr. Battle: I except.

Mr. Battle: I am now addressing myself to sub-division (*b*) of paragraph 7 of the plea, which reads as follows:

"Alleges that said case (the United States v. Harry
85 F. Sinclair and Albert B. Fall, Criminal Docket No. 43324) was not called for trial on April 2, 1928, and that defendant did not receive due or lawful notice that the trial of said case was continued to April 9, 1928; that there were no proceedings in said case on Monday April 2nd, 1928, at 10 o'clock a. m., or at any other time on that day; that defendant could not have testified in said case on April 2, 1928, on behalf of the United States, or otherwise, had he then appeared in response to said subpœna; that defendant was not called as a witness or otherwise, in said case or by or on behalf of this Honorable Court, at any time on April 2nd, 1928."

The Petition for the Order to Show Cause does not contain any allegation that the defendant was not here on April 2nd.

The Court: Can you tell off hand when the order continuing the trial to April 9th was actually made?

Mr. Battle: It was made on March 22nd. On March 22nd application was made for a continuance. I have the minutes of the court proceeding on that day. On March 22nd the Court said: "I will set this case for the 4th of April, that is Wednesday." The Court said: "This case has been set for April 2nd for several months and I have now set it for the 4th day of April." That was on March 22nd, according to the records of this Court. The trial day was

changed from the 2nd to the 4th. Then, on the 3rd, the day after the 2nd——

The Court: Let me interrupt you further. I cannot remember all these details. There must have been some sort of matter suggested to the Court.

Mr. Battle: There was. A continuance was asked for the purpose of taking Secretary Fall's deposition.

Mr. Roberts: Mr. Battle has that wrong, if your Honor please. The way the meeting came to be held on March 22nd was that the Government moved for a severance, and to try Harry F. Sinclair alone. When we gave notice of that motion we received notice that there would be objection to that severance. We came into court on the 22nd of March and it was then stated that Mr. Fall would not be
86 able to be at the trial of April 2nd; that he was entitled to be at the trial, and that we were not entitled to a severance. Judge Bailey overruled that and rendered the severance. Then our friends on the other side said that if there were a severance so that Mr. Fall who was then ill, could not be in court, they ought to have the right to take his deposition. We replied that they had had months to take his deposition, and Judge Bailey said in effect that he had not much sympathy with this late application for that purpose, but that if the parties could get out to El Paso, Texas, and take that deposition he would afford two extra days, and he would therefore not convene the trial which was set for April 2nd until April 4th. Senator Pomerene then rushed off to take the deposition with counsel for the other side. Being set for the 4th, if your Honor please, on the 3rd Mr. Hoover came in again before Judge Bailey and gave me notice. Senator Pomerene was then on his way East from taking this deposition and had not arrived, but was due to arrive on the 4th. The train on which he was was wrecked and he wired me that he would not get in on the morning of the 4th, but that I should proceed with the trial until he got there. Mr. Hoover represented that they needed a few extra days to get this deposition typed, it being a very lengthy one and to get the Commissioner's return, and that they would not be prepared to go on on the 4th. Mr. Justice Bailey then said that as Good Friday intervened it would hardly be worth while to allow one or two extra days to-wit the 5th or 6th, and he would consequently again adjourn the opening of the trial until April 9th. I

think that is a full and complete statement of everything that occurred.

Mr. Battle: The point is that the adjournment of the case, which was set for April 2, which was the day on which Mr. Blackmer's subpœna called for his attendance, was made on March 22nd. I am reading from the minutes of the court. Mr. Leahy said:

"If your Honor please, in the case of United States versus Sinclair and Fall, on behalf of the defendant
87 Fall, I am moving at this time for a continuance of the trial of this case, which was set on the 2nd of April."

Then Mr. Leahy mentioned the supporting affidavits, and the Court said: "I will set this case on the 4th of April."

Then the Court went on to say: "This case has been set for April 2 for several months, and I have now set it for the 4th of April."

Mr. Battle: My claim is that on the 2nd of April there were no proceedings in court; no directions were given to any witness to attend at any later date. Therefore my client cannot be held for contempt for not having been here on the 2nd. It is conceded, from Mr. Robert's statement, and from what I have just read from the record, that an order was made by Mr. Justice Bailey in this court on March 22nd changing the date of the trial from April 2 to April 4. It is also stated that on April 3, the case was further adjourned until the 9th.

I offer to prove, by the dockets of the Court here, that there is no record of any proceeding in the case of United States versus Sinclair and Fall, on April 2. The criminal docket will show that. Mr. Millikin, my associate, has examined the docket and tells me that there is no entry.

The Court: That is your offer?

Mr. Battle: That is my offer.

The Court: Have you anything to say, Mr. Roberts?

Mr. Roberts: I object to its relevancy, if your Honor please, it being the fact that the subpœna required the witness to come here on April 2 and not to depart the court without the leave of your Honor, or the presiding Justice, whoever he might be, and/or the District Attorney. It was his duty, I submit, to report himself and have news, then,

from the District Attorney or from your Honor's clerk, of the day he should attend in lieu, because obviously,
88 the subpœna held, under the circumstances I have stated, for any two or three day adjournment of a trial which had, as Mr. Justice Bailey said, been fixed for months.

The impracticability of your notifying a witness who is coming from a great distance, if your Honor please, of a two or three or five day adjournment must be obvious to the Court. The very circumstances that occurred in this case illustrate it. We had witnesses coming from the Pacific Coast. We could not notify them of the adjournment to the 4th of April, or the 9th of April, either one, in time to stop them. We did not dare to try to stop them. We had to let them come, and they did come, and, like good citizens waited, when they arrived here and found they were not needed until the 9th. They received witness fees while they were here, because it was not their fault. That was their duty, and it was his duty, and I submit it would be irrelevant as a defense in this case.

Mr. Battle: Our contention, if your Honor please, is that there was no meeting of this court on April 2nd. If this court had met on April 2nd and instructions had been given for any witnesses who were in attendance to come back on the 9th, that would be an entirely different situation. What we are complaining of here is that our client was subpœnaed to appear on April 2; that on the date he was called upon to appear, there was no court here at all in that case; no direction was given to witnesses on that day, and under those circustances he cannot be held for contempt.

Mr. Battle: That case was not on the calendar. That case was not called. No direction was given to the witnesses. So far as that case is concerned there was no court here.

The Court: I shall be very much surprised if you find authorities for that proposition. The possible disastrous effect of any such ruling is perfectly obvious, in the administration of justice in any court, it seems to me. Here we have a simple matter—by "simple" I mean irrespective

of the legal contentions you have been making here
89 as to the constitutionality of this act, and so forth.

Here we have a criminal case pending in this court, and in preparation for its trial the prosecutor has issued, or caused to be issued by this court, subpoenas to witnesses who, he believes, will be necessary to support the indictment at the trial. He does that. Among them, under the act in question, the Walsh Act, he has this witness in Paris subpœnaed to be here on the 2nd. He does not obey the command. You have stated the reasons he assigns for it, from the standpoint of the legal questions here presented, but the fact remains that he did not obey that subpœna to be here to testify on behalf of the Government in that case; and because an adjournment of the trial of that case was ordered on the previous day, on application, and after hearing the parties, the prosecution and the defendants named in that case, these orders were passed, to which my attention has been called. What has this witness got to do with all that?

Mr. Battle: I will tell your Honor exactly what he has to do with it, in my view of it. He was called upon to appear here on the 2nd. Nothing would have been easier than for the clerk of the court to call that case on the morning of the 2nd and give instructions to any witnesses who were subpœnaed to appear, to attend on the adjourned date. That is the usual and customary practices in cases of adjournment. Ten days before that time an order had been made by the court adjourning it until a later day, until the 4th. On the day when my client was subpœnaed to appear here, the case does not appear on the calendar at all. No instructions were given by the clerk, and, so far as the record shows, nobody here was interested in the case.

The Court: What you are now saying might make a very strong appeal in the case of a witness who had obeyed the summons and come only to find that some days before the court, on a showing made by the prosecution, after hearing counsel for the defendants, adjourned the trial to a later
date than that called for in the summons. Under
90 such circumstances, if the witness had come to the court on the 2nd day of April, there might be some question whether he could be adjudged in contempt. But this witness was not confronted with anything of that kind.

He did not come. He declined to come. He refused to obey the command of that summons. It does not lie in his mouth, it seems to me, now to make complaint about this adjournment. I think the objection of want of relevancy and materiality is sound, and I sustain the objection.

Mr. Battle: I want to say, if your Honor will allow me just for a moment, that this is an application to hold him for contempt for not appearing here, and our position is that the Government must show that they complied with all the requisites on their side. He was subpoenaed here to appear on the 2nd, and before they can hold him for contempt they must show that the case was called on the 2nd and that instructions were given to witnesses to appear at a later date, or that some notice was given to this witness of an adjournment.

The Court: I think I grasp the implications of your argument, Mr. Battle, but I cannot see that it overcomes the simple fact that this witness refused and declined to obey the command of this summons. He gives the reasons through his able counsel. I think the objection on the ground of want of relevancy and materiality is sound, and I sustain the objection.

Mr. Battle: I respectfully except, your Honor.

I offer to prove now that this case, United States versus Harry F. Sinclair and Albert B. Fall, Criminal Docket No. 43,324, was not called for trial on April 2, 1928; that there were no proceedings in that case on Monday April 2, 1928, at 10 o'clock a. m., or at any other time on that date; that defendant was not called as a witness, or otherwise, in said case, by or on behalf of this Honorable Court, at any time on April 2, 1928. That is my offer.

The Court: That is your proffer?

91 Mr. Battle: Yes.

Mr. Roberts: For the purpose of the record, if your Honor please, we admit that those facts alone are true.

Mr. Battle: Your objection to the proffer is withdrawn?

Mr. Roberts: No, I admit that the facts as stated in that proffer are true. That relieves you of proving them.

The Court: It is now of record that the Government admits that the facts you seek to prove are true, not at all waiving the objection.

Mr. Roberts: Not at all waiving the objection to the relevancy of the other matters.

The Court: That simplifies your task.

Mr. Battle: I understand objection is made solely to the relevancy of the evidence, and, as to that, it is sustained by the Court.

The Court: Yes.

Mr. Battle: I respectfully except.

Mr. Battle: In paragraph 8, your Honor, of the plea, subdivision (*c*), as follows:

"Alleges that defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday, April 9th, 1928, but was commanded to attend said trial on April 2, 1928; that no trial of said case was had on April 2, 1928, that defendant was not lawfully bound to attend the trial of said case of April 2, 1928, on April 9, 1928, or at any other time."

the same point is raised and I make the same proffer.

Mr. Battle: I offer to prove, under that sub-paragraph what is alleged there.

Mr. Roberts: I admit that the facts stated in the following parts of that sub-paragraph are true, to wit:

"That defendant was not commanded by said alleged subpœna to attend the trial of said case on Monday April
9, 1928, but was commanded to attend said trial on
92 April 2, 1928; that no trial of said case was had on
April 2, 1928,"

but I do not wish my admission taken to cover the last clauses, to wit,

"that defendant was not lawfully bound to attend the trial of said case on April 2, 1928, on April 9, 1928, or at any other time,"

as that pleads a conclusion of law.

Mr. Battle: I do not ask for that. I am asking only, of course, for an admission as to the facts.

The Court: As I understand it, this admission of yours, Mr. Roberts, is for the purpose of the record.

Mr. Roberts: Yes, sir.

The Court: You admit that the statements made there are true as a matter of fact?

Mr. Roberts: I also wish my admission to be taken in connection with the language of the subpœna itself, which is not included in the wording of that plea, namely, that he was to remain and not depart the Court without leave of the District Attorney or the Court.

Mr. Battle: That is in evidence, of course.

The Court: I am not at all satisfied with your admission, Mr. Roberts. If I view the matter correctly, the command of this subpœna to be here on the 2nd and obey that subpœna, commanded him to appear here at a later date.

Mr. Roberts: Yes, sir, it did. It commanded him to appear at any later date.

The Court: You are admitting——

Mr. Roberts: I admit merely that the subpœna referred to a trial on April 2.

The Court: That is, the subpœna, in its language, indicated April 2 as his first appearance.

Mr. Roberts: Yes.

The Court: Not his later appearance.

Mr. Roberts: Not that he had any right to leave
93 at that time any trial.

The Court: With that undertsanding of the extent and scope of your admission, you are absolved from the necessity of proving it, Mr. Battle.

Mr. Battle: Of course, the subpœna is in evidence, and the words of the subpœna speak for themselves.

The Court: There has not been any objection made.

Mr. Roberts: I object to its relevancy, if your Honor please, unless it is followed by other or different proof than comprehended in the proffer. Your Honor will observe that there is nothing in that proffer to the effect that the witness obeyed the subpœna, was here on April 2, and could not find a court.

Mr. Battle: There is no allegation in the petition that he was not here, either.

Mr. Roberts: No, certainly not.

The Court: The Court is not prepared to say or believe that this subpœna that ordered him to appear on April 2, did not include in it the requirement that he should be present at any later date the court might sit. So that, whatever the bare naked fact may be as to the precise language of the

subpœna with reference to this date of April 9, I think the proof that it did not contain specifically April 9 as a date is irrelevant and immaterial, and I sustain the objection to that.

Mr. Battle: I respectfully except, your Honor.

Mr. Battle: If your Honor please, I now will take up the 11th further plea. The issue is joined on that. That plea reads:

"That after the alleged service of the pretended subpœna referred to in paragraph 5 of said Petition for Order to Show Cause, defendant, desiring to perform his legal obligations (if any), obtained opinions in that regard from several attorneys-at-law of high repute in the United States; that he was advised by each and all of said attorneys after full consideration, that he was not under any such obligation, but that on the contrary, said alleged service
94 and the proceedings purporting to authorize the same, and the provisions of said Act of Congress were unconstitutional and wholly void and of no force for the reasons hereinbefore mentioned, and relying on such advice defendant did not appear according to the purported demand of said pretended subpœna so illegally served."

Whereupon **George Gordon Battle** was called as a witness on behalf of defendant, and, having been first duly sworn, testified as follows:

My name is George Gordon Battle. I am an attorney at law, and have been practicing for about forty years.

Mr. Pomerene: We will admit that the witness is eminent counsel.

The Court: I think there is no question as to Mr. Battle's qualifications. I assume that special counsel are agreed that he is a qualified witness.

Mr. Pomerene: Certainly.

Mr. Battle: I was in Paris, France, in the summer of 1927, just after these subpœnas had been served on Mr. Blackmer and saw Mr. Blackmer there at that time. I discussed with him the constitutionality of the Walsh Act and of the procedure under the Walsh Act, and advised with him as to what his action should be with respect to responding to the subpœna mentioned in the Petition for the Order to Show Cause in contempt No. 18. I told him that we had consid-

ered very carefully the question of the constitutionality of the Walsh Act; that we had obtained opinions on it of several different lawyers including Mr. Henry McAllister, of Denver, Colorado, a lawyer of great distinction and eminence; Mr. Karl C. Schuyler, also of Denver, Colorado, a distinguished lawyer; Mr. George E. Holmes, of New York, a distinguished and well known lawyer of the New York Bar.

The Court: Where was Mr. Blackmer's original native city or state?

Mr. Battle: He came originally from Massachu-
95 setts, your Honor. He went West on account of his health when he was a young man, and went first to Cripple Creek, I think, in the early days, and Colorado Springs. He was an attorney at law there.

The Court: Where was he living in the United States when he left the United States to go abroad?

Mr. Battle: Denver. That was the occasion for my consulting these Denver counsel. I told Mr. Blackmer that the advice of all these lawyers, their opinions and my opinion, the opinion of Mr. Millikin, and of my own partners, all of whom had carefully examined the Act, was that the Act was unconstitutional, and therefore that the subpœna was not a valid obligation upon him. Mr. Blackmer said he wanted our advice and would rely upon it. I also told him that Senator Charles S. Thomas of Colorado had given an opinion that in his judgment the Walsh Act was entirely unconstitutional. Mr. Blackmer said he would depend upon and follow the advice we gave him at that time. Later, after the subpœnas issued and the proceedings had started, I told Mr. Blackmer that Governor Miller had examined the Act and that he gave the same opinion. I advised Mr. Blackmer that the Act was unconstitutional, that it was void, and that the whole proceedings under it would be void.

Cross-examination.

By Mr. Roberts:

Mr. Battle: Mr. Blackmer was a lawyer and I was his counsel even considerably before this subpoena went out. I knew that letters rogatory were issued to take his testimony in the suit in Wyoming.

Mr. Roberts: And you knew that he refused to give more than his name and age?

Mr. Millikin: Your Honor, I object to the question as incompetent, irrelevant and immaterial. The Wyoming case is not in this proceeding.

Mr. Roberts: I want to show this man's mind toward his Government, his willingness to serve it, and his unwillingness to serve it. If this is offered in mitigation, if your Honor please, your honor has a right to know what this man's attitude was.

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Mr. Millikin: This is offered as a part of the pleadings and answer of this defendant. Under the testimony that has been permitted, it is not mitigatory at all.

Mr. Roberts: It would be anything but mitigation. Your Honor is familiar with the Chapman case. Your Honor is familiar with the Sinclair case, and the Cook case. The order of proof is immaterial here. We did not object to it because we knew he would be allowed to state it. It cannot be a defense when a man deliberately asks his lawyer to advise him, and says, "on that advice I will not obey the order of the court." That cannot be a defense. If that were true, every man who was ever summoned into court would get out of his obligation by hiring some lawyer and paying him, and taking his opinion that he did not have to come.

The Court: I judge, from the character of the question put, to which objection is made, that it is designed to bring out the fact that Mr. Blackmer had refused any information about himself. As I understood the objection, he refused to give his name.

Mr. Roberts: No. He gave his name and age, and then refused to answer any further questions.

Mr. Millikin: If your Honor please, we object——

The Court: Was this prior——

Mr. Roberts: This was prior to this subpœna. It was in the suit of United States versus Mammoth Oil Company, Mr. Sinclair's company, of the District of Wyoming, in which the same plaintiff was seeking civil remedy on the same question for which it sought criminal remedy in this court.

The Court: State your objection again, please, Mr. Millikin.

Mr. Millikin: We object to the line of questioning for the reason that the suit referred to by Mr. Roberts has no connection whatever with these proceedings. Second,
97 that the state of mind of the defendant in another proceeding has no relevancy to the issues in this case. Third, that the testimony being offered here is not by way of mitigation, but was a part of the defense set out in the answer of this defendant, and that the objection comes too late. If we are going into what Mr. Blackmer's mind was in the Mammoth case at Cheyenne, that involves a very vast record that ought to be brought here so that we will know exactly what was said there, and to be properly introduced. I do not take it we are here for that purpose.

The Court: As I understood the purport of the question on cross-examination, it was merely designed to bring out the fact from Mr. Battle, that Mr. Blackmer, the witness in this case, desired by the Government, was desired by the Government as a witness in a Civil proceeding.

Mr. Millikin: Yes.

The Court: At an earlier date, prior to these proceedings; and that beyond giving his name and age, he declined to testify in the case. I do not know under what circumstances; whether this declination of his occurred in the execution of letters rogatory.

Mr. Roberts: I will ask Mr. Battle. He knows all about it. He can tell us.

The Court: Suppose you do that.

Mr. Roberts: Mr. Battle, you were Mr. Blackmer's counsel——

Mr. Millikin: Has your Honor ruled on my objection?

The Court: Not yet.

Mr. Roberts: You were Mr. Blackmer's counsel when the case of United States versus Mammoth Oil Company, and others, was being tried in the District Court of Wyoming, were you not?

Mr. Battle: I was Mr. Blackmer's counsel.

Mr. Roberts: And you were attending that trial as his counsel, and observing that trial for him throughout, were you not?

98 Mr. Battle: At Cheyenne.

Mr. Roberts: And you know that that was an equity case, founded on allegations of fraud and conspiracy against

the Mammoth Oil Company, and asking for the cancellation of the Teapot Dome lease, do you not?

Mr. Millikin: I object. I take it, your Honor, that my objection goes to all these questions.

Mr. Roberts: These are preliminary.

The Court: I had reserved ruling on your original objection because I made the suggestion to counsel that I wanted to know more about the circumstances under which it is said that Blackmer declined to testify in the civil suit, before I ruled on your objection as to the relevancy.

Mr. Millikin: I would like to have the record show our objections to these preliminary questions, because they are bringing in and developing, through the answers of the witness, the very things we are objecting to.

Mr. Roberts: Mr. Battle, answer my last question.

The Court: I will overrule that objection.

Mr. Millikin: I note an exception, your Honor.

Mr. Battle: Yes, sir, I think that correctly states it. As Mr. Blackmer's counsel I am familiar with the fact that in the bill of the Mammoth Oil Company case, Mr. Sinclair was charged amongst other things, with conspiracy with Mr. Fall, as in the criminal cases; that there was an application made to the United States District Judge at Cheyenne to take the testimony of Mr. Blackmer on the issues, amongst others, of conspiracy to defraud the United States; that letters rogatory were issued by Judge Kennedy, of that court, addressed to a French Court to examine Mr. Blackmer before them on certain questions propounded by the Government touching this alleged conspiracy.

By Mr. Roberts:

99 "Q. And you know that you went abroad and advised with Mr. Blackmer at that time? A. I was abroad at that time.

"Q. And as a result of this, when the letters rogatory were exposed to Mr. Blackmer and the questions propounded to him by a French judge of a French court, he answered the first two questions, that his name was Harry M. Blackmer, and gave his age, and then said he refused to answer any further questions of the Government on the matter. That is correct, is it not? A. He declined to make any further answer, and the court sustained his declination.

"Q. Then, under your advice, he refused in the civil matter to give the Government the benefit of his testimony. Am I right? A. No; I advised him as to his legal rights."

Mr. Millikin: It is now past the preliminary state, if it please your Honor.

The Court: Nothing is going in that affects your original objection, which is still pending and to be decided.

"By Mr. Roberts:

"Q. Coming to the question of this subpœna issuing out of this criminal court, you of course said to Mr. Blackmer that the penalty, if you should be wrong in your opinion would be a contempt proceeding and punishment of him for contempt, did you not? A. He knew the provisions of the Act. I told him the provisions of the Act.

"Q. Therefore he was entirely familiar and you discussed the fact that if you and this other array of legal gentlemen were wrong he must suffer the penalty? A. He knew the provisions of the Act. I cannot say we specifically discussed them.

"Q. Did you discuss what would probably be done to him if you were wrong in your views? A. I recall distinctly telling him what the provisions of the Act were, and to that extent——

"Q. Then so far as his action can be characterized, it was absolutely deliberate, was it not—after the fullest consideration? Yes or no. A. He gave it the most careful consideration.

"Mr. Roberts: That is all, sir.

"The Court: That brings us to the consideration of your original objection."

Mr. Millikin: Will your Honor now rule on the objections as made?

The Court: Your original objection?

Mr. Millikin: Yes, your Honor.

The Court: As the matter appeals to me, it is in this wise. We are hearing simply the allegations of contempt of the process of this court in this criminal proceeding, the refusal of the witness to obey the subpœna that was issued and served upon him; and the testimony that Mr. Battle

has given us shows that in another and earlier proceeding, a civil proceeding in which, allowing for the difference between the one being civil and the other criminal, the basis of both is essentially the same. The charge was conspiracy to defraud. That was the indictment was it not? And that seems to have been the basis in part, at least, of the civil proceeding instituted, in which civil proceeding Blackmer was to be examined as a witness for the Government and he declined to give his testimony. We do not have precisely the same situation. In one case we have Blackmer refusing in the criminal case to obey the subpœna issued by this court. Mr. Battle has given his testimony as to how that came about, that it was under his advice as counsel that Blackmer refused obedience to the summons. He has stated the reasons which actuated him in giving that counsel and advice to Blackmer.

We have a rule of evidence that it seems to me is applicable here, that while we may not establish the guilt
101 of a person in one case by reason of the fact that he has been guilty of similar acts, ordinarily, when the question on trial is one that involves intent, motive, purpose, a state of mind, then light is shed upon that state of mind by similar acts or substantially similar acts by the party involved; and the fact that in this somewhat earlier civil proceeding involving, as I have said, and as I understand the matter, practically the same predicate for the assertion by the Government in this civil proceeding that is made herein the indictment in this criminal case, it is competent to consider it with reference to whether as a matter of mitigation or as a matter of absolute defense it is a defense that should be considered by the court in this case. I think the evidence is competent on cross-examination.

Mr. Battle: If your Honor will permit me to say that it might be inferred from what your Honor has said that your Honor was of the opinion that these other lawyers and myself had advised Mr. Blackmer not to obey the subpœna and not to come to court. That is not the fact.

The Court: I did not think so. Your testimony was that you gave him your best opinion as to this Act and the proceedings under it.

Mr. Battle: That is correct.

The Court: I did not understand from your testimony

that you, a lawyer and a member of the bar, told this man to violate a court order.

Mr. Battle: None of the lawyers were asked on that point. We were asked to give our opinion on the constitutionality of that Act, and that we gave.

The Court: I understand that; and I understood your testimony to be this, that having given your opinion that the Act was void, and therefore the proceedings under it were void——

Mr. Battle: He asked us for our opinion and we
102 gave it. I would also say in regard to the letters rogatory that Mr. Blackmer depended upon the opinion of French counsel that he was not under any obligation to answer the questions addressed to him in the French court.

Mr. Pomerene: That was under French jurisprudence.

The Court: I remain of the opinion that counsel have not gone beyond the legitimate scope of cross examination in this case with respect to this single point, and I think your objection should be overruled.

Mr. Millikin: I save an exception, please.

"By Mr. Millikin:

"Q. I would like to ask you, Mr. Battle, whether you did tell Mr. Blackmer that Senator Thomas, Mr. Schuyler, Mr. McAllister, Mr. Levy and Mr. Holmes had advised the same? A. I did.

"The Court: He did say that, and he has just now added that French counsel advised similarly.

"The Witness: As to letters rogatory; that being the proceeding in the French court.

"The Court: The French court was the functionary authorized under our act of Congress to execute the letters rogatory.

"By Mr. Roberts:

"Q. Is it not the fact that French counsel advised that the French courts under their law had no power to compel Mr. Blackmer to reply, and that if he stood silent he could not be punished under the French law? A. The French counsel advised that he was under no obligation to answer.

"Q. Did they not advise that if he did not answer he could not be punished under French law? A. I do not recall that he did.

"Mr. Roberts: That is all."

Mr. Battle: Coming now to the 12th further plea
103 I call the Court's attention to the records of the court—I do not think it is necessary to offer them in evidence—that the first Sinclair trial resulted in a mistrial, and the second trial which followed was upon the same indictment as the first trial which resulted in a mistrial. There was, first, a mistrial, and then a completed trial upon the same indictment. The facts are that the first trial resulted in a mistrial and that the second trial was on the same indictment as the first. I am offering these proofs in defense.

Mr. Roberts: We object to its relevancy as a valid defense, admitting the facts to be true that the first trial was a mistrial and that both trials were on the same indictment.

The Court: I think you have all that you need on the record on that.

Mr. Battle: Does your Honor rule on the objection?

The Court: Yes; I think the objection is well taken.

Mr. Battle: We respectfully except.

That concludes our proof on Contempt No. 18, and if the Government has no further proof, the proof in that matter will be considered closed.

Owen J. Roberts was then called as a witness in rebuttal on behalf of the United States, and being first duly sworn, testified as follows:

Direct examination:

Mr. Roberts: In view of the statements in the pleadings, the truth or accuracy of which I admitted as Government Counsel, I wish to put on the record what was stated at the bar of the court and which I think is not of record in the court now, that as the records of this court will show, the case of United States versus Sinclair and Fall was originally set by the court for April 2nd, 1928.

On March 22 there came on for hearing a motion for severance made by the Government. Counsel for the defense both objected to that severance and asked for a continuance on the ground that Fall, one of the defendants, was
104 unable physically to attend the trial. Counsel for the Government insisted that that was an additional reason for a severance and not a continuance. Mr. Justice Bailey who heard the applications on March 22, granted the severance, and then stated that he would take up the trial of the case on April 4 instead of April 2. It was agreed that the deposition of Mr. Fall would be taken, if possible, in the meantime. Government counsel waiving notice and co-operating for that purpose. On April 3, Senator Pomerene being on his way back from the West where he had taken Mr. Fall's deposition or had participated in its taking, and I being in Washington preparing for the trial, I was notified by counsel for the defense that an exigency had arisen which would make it impossible for them to go on with the tiral on April 4. Judge Wright who was to participate in the trial for the defense had not arrived back from the West where he went to take Mr. Fall's deposition. Senator Pomerene had not arrived back from the West, but I expected him on the morning of April 4, the day that Justice Bailey had set. Consequently an oral application was made to Mr. Justice Bailey on the morning of Apr[illegible] Senator Pomerene being absent and I being present, fo[illegible] a few additional days' time in order to get Fall's deposition back and in order that Judge Wright could acquaint his colleagues with what was in that deposition preparatory to trial. Mr. Justice Bailey remarked that Good Friday would intervene between the 4th and the 9th and that he would not sit on Good Friday and that he would consequently grant the application to the extent of setting the case for the morning on Monday, April 9.

Mr. Pomerene: In opening your statement you said that the case was originally set. You mean, the second time?

Mr. Roberts: I meant it was set months before the trial, on April 2nd. It had been set before that time.

Cross-examination:

Mr. Battle: There was a motion also made in addi-
105 tion to the motion for severance? There was also a motion made for a continuance?

Mr. Roberts: After we had notified the other side we would sever on account of Fall's illness, they said they would not resist the motion for severance and would move to continue. This motion was made by Mr. Leahy of this bar, and on that application Mr. Justice Bailey on March 22, set the case for trial on the 4th of April. I have no doubt that Mr. Justice Bailey said: "This case has been set for April 2nd for several months. I have now set it for the 4th day of April." On the 3rd day of April Mr. Hoover made a motion for a postponement of the case on some affidavits, but largely on oral application. There is no doubt that a motion was made on the 3rd and there is no question that the case was then set down for the 9th.

Mr. Battle: That is all.

Mr. Roberts: The Government rests in the case.

Mr. Battle: Testimony being closed on both sides, your Honor, I now move for a judgment of this Court determining that the defendant is not guilty of contempt and asking release of his property and dismissal of the proceedings on each and every ground on which the motion was originally made at the beginning of this hearing and on each and every ground on which the motion was renewed at the beginning of the taking of testimony and at the close of the testimony offered on behalf of plaintiff.

The Court: I am not going to pass on the motion at the present moment. My ruling is reserved without prejudice until you have put in No. 16.

Mr. Battle: I will ask that the motion be considered as being made upon each and every ground that was presented.

The Court: I understand.

After the evidence was put in Contempt No. 16, Mr. Battle said: I move, if your Honor please, on behalf of the defendant, that these proceedings be dismissed and
106 that judgment be rendered on behalf of the defendant, finding him not guilty of contempt, and directing the release of his property, and dismissing these proceedings on each and every ground enumerated in the previous motions.

The Court: Your motion is overruled, Mr. Battle, for the dismissal of the whole proceedings now.

Mr. Battle: I respectfully except and ask that an exception be noted to the denial of the motions, on each ground. I note a separate exception on each ground.

Then, for the purpose of the record, your Honor, I object to any judgment being rendered herein the absence of the defendant, to preserve my rights on that point.

Mr. Pomerene: I move for judgment on the pleadings on the evidence as submitted.

The Court: And counsel for the respondent objects to the consideration of the motion in the absence of the defendant.

Mr. Battle: That is correct, your Honor.

The Court: On that ground, of course, your objection is overruled.

Mr. Battle: I except, your Honor.

That objection goes to both proceedings, contempt No. 16 and No. 18.

The Court: Yes.

The Court then proceeded to render its decision saying in its opinion:

"The Court has no difficulty at all in determining that Mr. Blackmer has been guilty of contempt of this Court, and now formally declares and adjudicates Blackmer to be in contempt of this Court under both of the proceedings, No. 16 and No. 18, which have been the subject of our consideration for the last two days."

The Court then proceeded to consider the penalty
107 which should be imposed, saying:

"I think that in No. 16 the penalty that must be imposed is that of $30,000 and costs, and the funds or bonds in custodia legis will be charged with that fine of $30,000 and costs in No. 16; and in No. 18 the penalty is the same."

Mr. Battle: If your Honor please, I respectfully note an exception to the judgment of the Court, and we will note an appeal, your Honor.

It was agreed that a supersedeas bond should be fixed in the sum of $1,000 with a proviso in the bond that nothing in it contained shall release the bonds from the present custody.

And be it remembered that:

The foregoing contains the substance of all the testimony given at the trial of said cause bearing upon the exceptions herein reserved on behalf of defendant, and each and all of the exceptions stated to have been taken by the defendant were so taken, and were duly allowed by the Court, and entered upon the minutes of the Court; and in order that each and all of said exceptions may be preserved and made a part of the record in this cause, this Bill ~~of~~ Exceptions is duly dated, approved, signed and ordered to be made of record in the above entitled cause this 15th day of January, 1930.

F. L. SIDDONS,
Justice.

Approved:

LEO A. ROVER,
United States Attorney.
ATLEE POMERENE,
Special Counsel.
OWEN J. ROBERTS,
Special Counsel.
GEO. GORDON BATTLE,
Attorney for Defendant.

108 [Endorsed:] In the Supreme Court of the District of Columbia. The United States vs. Harry M. Blackmer. In contempt No. 18. Amended bill of exceptions. (Original.) George Gordon Battle, Attorney for Defendant, 37 Wall Street, New York City.

Endorsed on cover: District of Columbia Supreme Court. No. 5132. Harry M. Blackmer, appellant, vs. United States. Court of Appeals, District of Columbia. Filed Jan. 29, 1930. Henry W. Hodges, clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Monday, February 2nd, A. D. 1931.

* * * * * * * *

It is ordered by the Court that, due to the disqualification of Mr. Chief Justice Martin, the Honorable Joseph W. Cox, Associate Justice of the Supreme Court of the District of Columbia, be, and he is hereby, designated to sit as a member of this Court in the hearing and decision of the following cases on its Calendar, namely, Nos. 5131, 5132, and 5171, January Term, 1931.

Charles H. Robb, Josiah A. Van Orsdel, Associate Justices.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Tuesday, February 3rd, A. D. 1931.

* * * * * * * *

No. 5131

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

and No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

On motion, the Appellant is allowed to file a reply brief herein with leave to Appellee to reply, and the time for argument is enlarged to two hours on each side.

The argument in the above entitled causes was commenced by Mr. Karl C. Schuyler, attorney for Appellant, and was continued by Mr. Atlee Pomerene, attorney for the Appellee.

* * * * * * * *

Wednesday, February 4th, A. D. 1931.

* * * * * * *

No. 5131

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

and No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

The argument in the above entitled causes was continued by Mr. Atlee Pomerene, attorney for the Appellee, and was concluded by Mr. George Gordon Battle, attorney for the Appellant.

Mr. Chief Justice Martin took no part in the hearing of these cases.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Nos. 5131, 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

(Before Robb and Van Orsdel, Associate Justices, and Cox, Associate Justice of the Supreme Court of the District of Columbia)

Mr. Justice ROBB delivered the Opinion of the Court:

In No. 5131 appellant, Harry M. Blackmer, was adjudged guilty of contempt of the Supreme Court of the District in failing to respond to a subpœna to appear on October 17, 1927, as a witness on behalf of the United States at the

trial of Harry F. Sinclair and Albert B. Fall in that Court on a criminal charge of having conspired to defraud the United States in violation of Sec. 39 of the Criminal Code.

In No. 5132, a mistrial of the Sinclair-Fall conspiracy case having been declared on November 2, 1927, appellant was again subpœnaed to appear on Monday, April 2, 1928, as a witness on behalf of the United States at the retrial of the case. Again he failed to appear. He was also found guilty of contempt of the Supreme Court of the District because of that failure.

The issuance and service of the subpœnas and the proceedings in each contempt case were under the provisions of the Act of July 3, 1926 (c. 762, 44 Stat. 835, U. S. C., Sup. IV, Tit. 28, Secs. 711-718).

Sec. 1 of that Act provides that whenever letters rogatory shall issue out of any court of the United States, addressed to any court of any foreign country, to take the testimony of any witness, he being a citizen of the United States or domiciled therein, and such witness, having been personally notified, neglects to appear, the court out of which such letters issued may authorize the issuance of a subpœna addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the court at a time and place therein designated.

The remaining sections read as follows:

"Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpœna

under this Act or at the request of the officer causing such subpœna to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpœna and supplied to the consul making the service.

"Sec. 4. If the witness so served shall neglect or refuse to appear as in such subpœna directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

"Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

"Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to publish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

"Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in Section 57 of the Judicial Code."

On May 13, 1925, in the court below, Sinclair and Fall were indicted for conspiracy to defraud the United States. On May 13, 1927, counsel for the United States filed in that court a petition stating that at the trial of the case they desired the attendance of appellant and another; that appellant was a citizen of and then beyond the jurisdiction of the United States; "that your petitioners believe and therefore aver that the attendance of the said persons at the trial of the said cause is vital and important to the United States, because as your petitioners aver, they believe that the said witnesses have knowledge and information with regard to certain important facts which the United States desires to prove in the said cause, and that their testimony as to said facts will be material in connection with the establishment not only of the conspiracy charged between the defendants in the above captioned cause, but in connection with the proof of overt acts done by the defendants pursuant to said conspiracy. More particularly your petitioners believe and therefore aver that the said * * * and H. M. Blackmer can testify to facts concerning the persons who were in the latter part of the year 1921 and during the year 1922 stockholders of the Continental Trading Company, Ltd., a corporation, and with regard to the distribution by that corporation to its stockholders of certain United States 3½ Liberty Loan

Bonds as dividends, certain of which bonds, as your petitioners believe and therefore aver, were subsequently delivered by or on behalf of one of the defendants, Harry F. Sinclair, to the other defendant, Albert B. Fall."

The petition further prayed the issuance of a subpœna addressed to any Consul General or Consul of the United States within the Republic of France, or within any country in which either of the witnesses might be, "commanding such witness to appear before this Court in Criminal Court No. 2, at the City of Washington, D. C., on the 17th day of October, 1927."

This petition was duly verified by Owen J. Roberts, Special Assistant to the Attorney General, and now an Associate Justice of the Supreme Court of the United States. On the same day the court ordered the subpœna to issue, and fixed and determined at $500 the amount to be tendered to each witness "for his necessary expenses in traveling to and from Washington, D. C., and for his attendance at Court." Thereupon a subpœna in regular form was issued, and on May 27, 1927, was served on appellant by George Orr, Consul of the United States at Paris, France; the consul's return reciting that the service was "at the usual residence of the witness * * *, 25 Avenue Montaigue, Paris, France, and in the presence of Consul Raymond Davis and Mr. Henri Gadd, Attorney for the witness. The witness declined to accept the sum of $500 in United States currency tendered him for traveling expenses. The original copy hereof was left in the hands of the witness." On June 7, 1927, another such subpœna was served on appellant by Raymond Davis, Consul of the United States at Paris, who tendered appellant "the sum of $500 currency of the United States of America" which tender likewise was refused.

On November 4, 1927, counsel for the United States presented a petition to the court below for a rule in contempt, setting forth in detail the proceedings culminating in the failure of appellant to appear as a witness. In addition to the order to show cause, it was prayed that the court direct that the property of appellant within the United States of the amount and value of $100,000, or such other amount and value as to the Court might seem proper, be levied upon and seized by the Marshal of the court "and

held to satisfy any judgment that may be rendered against the said H. M. Blackmer in this proceeding."

On November 16, 1927, the court, on consideration of the foregoing petition, issued an order directing appellant to appear before the court on January 6, 1928, to show cause why he should not be adjudged guilty of contempt and punished accordingly, and that the property of appellant to the amount and value of $100,000 be levied upon and seized by the Marshal to satisfy any judgment that might be rendered against appellant in the proceeding. The order directed that the Marshal of the court making the levy forward to the Consuls of the United States at Paris, France, or in any other countries where appellant might be, a copy of the order, with the request that such Consul or Consuls make service of the same personally upon appellant; and, further, that the Marshal should cause the order to be published in the Washington Evening Star once each week for six consecutive weeks, "in accordance with the provisions of Section 6, c. 762, of the Act approved July 3, 1926, 44 Stat. 835."

The Marshal made return that he had executed the order by levying upon and seizing $100,000 in United States First Liberty Loan Bonds at the par value of $100,000, the property of appellant; and George Orr, Consul of the United States at Paris, France, made return that on the 5th day of December 1927, he had "served a true copy of the within order on the within-named Harry M. Blackmer by delivering said true copy to him". After the levy there was a publication once a week for six consecutive weeks in the Washington Evening Star.

In No. 5132 the verified petition for the issuance of a subpœna was filed on January 9, 1928. The court directed the subpœna to issue, commanding appellant to appear on April 2, 1928. The subpœna issued and was served by Consul Orr on the 1st of February, 1928. $500 in currency was again tendered appellant, and was again refused.

On July 6, 1928, counsel for the United States filed a petition for a rule to show cause, setting forth the proceedings culminating in appellant's failure to respond to the subpœna. An order to show cause was issued but was not served. On December 26, 1928, an alias order was issued commanding appellant to show cause, if any he had, why

he should not be adjudged guilty of contempt of court for failing and refusing to obey the subpœna theretofore issued in the case of United States v. Sinclair and Fall. The order further directed the Marshal of the District to make a further levy upon property of appellant in the United States to the value of $100,000. The Marshal levied upon the same property which he had seized in the prior contempt proceeding. The order was served upon appellant personally by Consul Orr on the 21st of January, 1929, at Paris, France. After the levy there was a publication once a week for six consecutive weeks in the Washington Evening Star.

In each case counsel for appellant appeared specially and moved to vacate the order to show cause and proceedings thereunder, alleging the same to be in conflict with the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution. The motions were overruled. Whereupon, pleas were filed, on which the United States joined issue or demurred. The cases were heard together, and a fine of $30,000, and costs, adjudged in each case, to be satisfied out of the property seized, unless otherwise paid.

Counsel for appellant, both in brief and argument, have displayed a wealth of learning and great industry in the presentation of their very numerous contentions, but, in our view, the controlling question is whether it is Constitutional for Congress to authorize the service of a subpœna upon a citizen of the United States residing abroad. In determining this fundamental question, we should construe the statute, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401; Baender v. Barnett, 255 U. S. 224, 226; Panama R. R. Co. v. Johnson, 264 U. S. 375, 396; Michaelson v. United States, 266 U. S. 42, 64. In the Sinking-Fund cases, 99 U. S. 700, 718, the Court said:

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Again, in Atkin v. Kansas, 191 U. S. 207, 223, the court said:

"We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

That the citizen, wherever he may be, and so long as he sustains that relationship, owes an absolute and permanent allegiance to his government, may not be denied. Carlisle v. United States, 16 Wall. 147, 154. He is entitled to the protection of his government, and in return the government is entitled to his unqualified allegiance. Minor v. Happersett, 21 Wall. 162, 166; Luria v. United States, 231 U. S. 9, 22.

In Rose v. Himely, 4 Cranch 241, 279, Mr. Chief Justice Marshall said:

"It is conceded, that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens."

In The Apollon, 9 Wheat. 362, 370, the court, speaking through Mr. Justice Story, said:

"The laws of no nation can justly extend beyond its own territories, except so far as its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."

In United States v. Bowman, 260 U. S. 94, it was held that a criminal statute dealing with acts that are directly injurious to the Government and capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect; that citizens of the United States while in a foreign country are subject to penal laws passed by the United States to protect itself and its property. In

United States v. Bennett, 232 U. S. 299, it was held that the Government of the United States as a nation by its very nature benefits the citizen and his property wherever found, and that no imaginary barrier shuts that Government off from exerting the powers which inherently belong to it by virtue of its sovereignty. In Cook v. Tait, 265 U. S. 47, it was ruled that Congress has power to tax income received by a citizen of the United States domiciled abroad from property situated abroad.

In Bartue and Duchess of Suffolk's Case, 2 Dyer's Rep. 176, b, 73 Eng. Reprint 383, and in Knowles v. Luce, Moore's Rep. #(K. B.) 109, 72 Eng. Reprint 473, it was held that at common law the sovereign has a right to recall the subject or citizen from abroad and may seize and forfeit all his property if he refuses to return.

We think it logically follows from the foregoing authorities that a citizen of the United States, though residing abroad, is nevertheless amenable to process issuing under a statute requiring him to appear as a witness in a court of the United States, and that, if he receives reasonable notice and reasonable travelling and attendance fees, due process is satisfied. It is inconceivable that a citizen witness may clog the wheels of justice by crossing the international border and that the Government should be powerless to summon him to return and to subject him to a penalty if, without cause, he fails to respond to the summons.

The Act of 1926 makes it the duty of a citizen, residing abroad, to return when wanted as a witness, and prescribes the notice to be served upon him. In serving that notice the consul exercises no sovereign power. His notice is informative and not coercive. Mr. Chief Justice Taft, speaking for the Court in United States v. Bowman, 260 U. S. 94, 102, said:

"Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government (of the United States) to which they owe allegiance."

So here, it is no offense to the dignity or right of sovereignty of France merely to notify an American citizen residing therein that he is wanted as a witness in a court of the United States. The consul who served the subpœna

was not acting in his consular or diplomatic character, but as a mere messenger of the Government of the United States. The Act might as well have authorized the Court to designate a messenger to serve the notice. Moreover, the record discloses no complaint on the part of France.

But appellant contends that the Act does not provide any valid method of acquiring jurisdiction to render a personal judgment against the defendant and his property; hence, that all proceedings authorized by the Act leading to the judgment against person and property, and all subsequent proceedings, are void as lacking due process.

Contempt proceedings "are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. * * * While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers v. United States, 264 U. S. 95, 103, 104.

In Ex parte Grossman, 267 U. S. 87, 117, the court said:

"Contempt proceedings are sui generis because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction."

In Cooke v. United States, 267 U. S. 517, the court reaffirmed the ruling in Ex parte Terry, 128 U. S. 289, that when a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. The court then said (p. 536):

"When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not

important. * * * Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.

In the present case, proof was made that appellant did not respond to either of the subpœnas. Thereupon the court, in each case, issued an order directing appellant to appear at a fixed time to show cause why he should not be adjudged guilty of contempt and punished accordingly; and the order in each case also directed that the property of appellant "within the United States, of the amount and value of $100,000, be levied upon and seized by the Marshal of this Court *and held to satisfy any judgment that may be rendered* against the said Harry M. Blackmer in this proceeding." (Italics ours.)

In No. 5131 the order to show cause did not set forth the basis of the order. In No. 5132 appellant was specifically informed that he should show cause why he should not be adjudged guilty of contempt in neglecting, failing and refusing to obey the subpœna, theretofore issued by the court and served upon him, to appear before the court as a witness in the case of United States v. Harry F. Sinclair and Albert B. Fall. In the circumstances of this case we do not think appellant is in a position to complain because the charge in No. 5131 was not more specific. To determine whether a defendant has been sufficiently informed of the charges against him, the reviewing court may examine the entire record. Schwartz v. United States, 217 F. 966. Mr. Blackmer is a lawyer, was represented by counsel throughout, and the record leaves no room for doubt that he fully understood that the rule to show cause in each case was based upon his failure to respond to the subpœnas.

Moreover, at the trial of the contempt cases, evidence was introduced by counsel for appellant in supposed extenuation of the offense in each case and in mitigation of penalty. This amounted to a general appearance and appellant will not now be permitted to challenge the sufficiency of the rules to show cause.

In each instance property of the value of $100,000 was attached to satisfy any judgment that might be rendered

against appellant. As provided by Sec. 5 of the Act, appellant received personal notice in each instance, and in each instance there was service by publication as required by Sec. 6 of the Act. In each instance, the charge of recusancy against him having been sustained, the court, as required by Sec. 7 of the Act, adjudged him guilty of contempt and imposed the only penalty provided by that section, namely, a fine of not exceeding $100,000—to wit, $30,000 in each instance. These judgments were to be fully satisfied out of the property attached. It is, we think, plain that there has been no attempt in these cases to obtain a judgment in personam to be enforced in any other court than the court below or in any other respect than upon the property under the control of that court. The proceedings were quasi in rem, in which class of cases a judgment binds nothing but the property attached. Cooper v. Reynolds, 10 Wall 308; Pennoyer v. Neff, 95 U. S. 714, 730. The fact that Congress theretofore had not authorized such a procedure does not militate against the existence of the power to do so. In Big Vein Coal Co. v. Read, 229 U. S. 31, it was ruled that a Circuit Court of the United States has no jurisdiction to issue an order of attachment in a case where no personal service can be had upon the defendant and where there has been no personal appearance in the action, but the court was careful to say: "If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided."

It is not necessary, therefore, to determine whether Sec. 4 of the Act authorizes a personal judgment in the absence of the recusing witness nor whether the prescribed procedure would constitute due process. We are convinced that Congress would have authorized the procedure under Sec. 5 irrespective of Sec. 4. Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 635-636; El Paso & N. E. Ry. v. Gutierrez, 215 U. S. 87, 96; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121.

Appellant advances the contention that the search and seizure of property authorized by the Act is unreasonable and violative of the Fourth Amendment. Reasonably construed, the Act does not contemplate or authorize an un-

reasonable search and seizure, and the records in these cases fail to disclose such a search and seizure. The Marshal's return in each case recites that he executed the order of the court "by levying upon and seizing One Hundred Thousand ($100,000) Dollars in United States First Liberty Loan Bonds at the par value of $100,000, the property of the said defendant, Harry M. Blackmer."

It further is contended that "by excluding defendants in criminal prosecutions from the right to extra-territorial subpœnas the Act violates that part of the Sixth Amendment of the United States Constitution providing that the accused in such actions shall have compulsory process for obtaining witnesses in his favor."

Sec. 1 of the Act provides that if a citizen of the United States while abroad refuses to respond to letters rogatory, the court out of which such letters issued may authorize the issuance of a subpœna for such citizen to appear before the court at the time and place designated. This section is available to either party in a civil action and to the defendant in a criminal action or in a contempt proceeding. Because of the provisions of the Sixth Amendment that the accused is entitled to be confronted with the witnesses against him, the United States is not entitled to letters rogatory in a criminal case. The defendant in such a case may have such letters and, if the witness refuses to respond, may have a subpœna. He has, therefore, substantially equal process to that accorded the United States. This is all that is required. In United States v. Heinze, 218 U. S. 532, the contention was advanced that the defendant in a criminal case was denied due process and equal protection of the law because he was not accorded rights to appeal equal to those accorded the prosecution. The contention was rejected.

In Blair v. United States, 250 U. S. 273, the plaintiffs in error had been adjudged guilty of contempt because of their refusal to obey a court order directing them to answer certain questions before a Federal grand jury, and committed to the custody of the Marshal until they should comply. On their refusal to answer the questions, the grand jury made a written presentment of the facts to the District Court, with the prayer that they might be dealt with as contumacious witnesses. Counsel for the witnesses

contended that the Corrupt Practices Act of June 25, 1910 (36 Stat. 822), was unconstitutional and void, and, hence, that the grand jury lacked authority to investigate supposed violations of that Act. In affirming the judgment, Mr. Justice Pitney for the Supreme Court said:

"In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not."

So here, it was the duty of appellant to respond to the summons, and it was not his function but that of the defendants in the criminal case to challenge the validity of the proceedings.

It is further contended that the Act violates the guarantee of due process under the Fifth Amendment "because it is arbitrary, capricious, unreasonable, indefinite and uncertain": first, because it makes "ownership of 'non-offending' property condition precedent to guilt of a criminal offense." Sec. 5, as we have already ruled, authorizes the quasi in rem proceeding whenever property of the recusing witness may be attached, but the contumacy of the witness depends not upon the ownership of property but upon the question whether he, without cause, failed to respond to the witness subpœna. Knowing that so long as the recusing witness remained abroad he could not be subjected to punishment, except through a fine levied upon his property located here, we think the provision was within the power of classification of Congress. As the court below observed:

"The provision of the statute for the sequestration of the property of such a witness within the territorial jurisdiction of the United States is analagous to the sequestration of property, not infrequently made, of a party litigant who otherwise, by the simple expedient of remaining out of the territorial jurisdiction of the court, may defeat the purposes of a suit or action."

Sec. 5 of the Act authorized the court to direct "that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized * * *, to be

held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted." Under Sec. 7, the limit of the fine is $100,000. It must be assumed, therefore, that the court, in the exercise of a reasonable discretion, would not direct the attachment of more property than necessary to liquidate the authorized fine. The circumstances of each case also would be an element in the determination by the court of the amount of the property to be attached.

Since personal service was had in the present cases, it is unnecessary to consider Sec. 8.

Appellant further contends that the subpœnas directed to him were not issued upon proper showing, and, hence, violative of due process under the Fifth Amendment. Sec. 1 of the Act authorizes the court to issue a subpœna "upon proper showing" in cases where a witness had neglected to respond to letters rogatory. Sec. 2 provides that whenever the attendance, at the trial of any criminal action, of a witness who is beyond the jurisdiction of the United States, "is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, * * *." It may be observed at the outset that it is for the court, in the exercise of a sound discretion, to determine whether a proper showing has been made, and not the recusing witness. That a proper showing was made in the present case is, we think, too plain to admit of doubt.

The Act of 1926 contains no requirement that the subpœna contain notice that it was issued under authority of the Act. It is to be presumed, therefore, that the ordinary form of subpœna was to be issued. Moreover, the records in these cases disclose that appellant had advised with counsel and was thoroughly familiar with the provisions of the Act. He not only was chargeable with knowledge of the Act, but was possessed of actual knowledge of the Act.

Appellant further contends that "the tenders of witness fees were insufficient and appellant was not bound to obey the subpœnas." In each instance the court, in conformity with the statute, fixed the amount to be tendered to appellant "for his necessary expenses in travelling to and from Washington, D. C., and for his attendance at Court," at

$500. In serving the first subpœna, Consul Orr tendered the $500 "for travelling expenses"; but in serving the second subpœna for attendance at the same trial, Consul Davis simply tendered $500; and Consul Orr in serving the subpœna in No. 5132 tendered $500 without any limitation. Appellant in each instance, so far as the records disclose, refused each tender without asking any questions and without any protest. There is no evidence that the amounts of the tenders were insufficient. If appellant did not understand what they were for, he was lacking in intelligence. Being a lawyer and actually familiar with the provisions of the Act, it will be presumed that he knew the purpose and scope of the tenders.

The contention is made that there was an abandonment of the seizure in No. 5131 by the seizure of the same property in No. 5132, and authorities cited to the effect that if in a particular action an alias order is issued before property taken under the original writ is disposed of, the alias order destroys the lien acquired by the original writ. These cases are not in point, for here there were two different seizures in two different cases upon two different causes of action. The two different levies in these cases are not inconsistent with an intent on the part of the Government to maintain each.

In No. 5132 appellant was subpœnaed to appear on April 2, 1928, "and not depart the court without leave of the court or district attorney." The trial was continued and did not commence until April 9, 1928, when appellant was called as a witness and did not respond. He now contends that he was not subpœnaed to attend the court on April 9, 1928, and, hence, that all proceedings in No. 5132 under his alleged neglect and refusal to appear as a witness are null and void. The record shows that the Sinclair-Fall case was set for re-trial on April 2, 1928. For cause shown, the trial court extended the time for commencement to April 4th and again until April 9th, 1928. Had appellant obeyed the subpœna and presented himself on April 2, 1928, as required, he would have learned of the continuance and would not have been given leave to depart by either the court or the district attorney. As the court below observed, "What happened on April 2nd in the way of continuing the hearing until a later date was none of his concern."

Finally, appellant contends that "the fines adjudged in these cases, totalling the sum of $60,000 ($30,000 in each

case) are so grossly excessive as to amount to deprivation of property without the due process of law guaranteed by the Fifth Amendment."

When appellant was called as a witness on October 17, 1927, his counsel appeared and attempted to explain why he was not present. In their brief they state that it was desired to give assurance that appellant had no contempt for the court, nor for the judge thereof, nor for the valid laws of the United States; that appellant, in good faith, believed and had been advised that the law and procedure thereunder violated his constitutional rights as a citizen.

In support of appellant's motions to vacate the orders to show cause, his counsel filed appellant's affidavit, in which appellant stated "that in the year 1924 he left the City of Denver, State of Colorado, United States of America, resigning his position as Chairman of the Board of Directors of the Midwest Refining Company, and retired from business, taking up his residence at Hotel Plaza Athenee, in the City of Paris, France (although retaining his American citizenship); that thereafter and in the year 1926 he formed the intention of residing permanently abroad and then disposed of his former home in the said City of Denver, since which time he has at all times resided abroad, spending his time in England, in France and elsewhere."

At the trial of the contempt cases, George Gordon Battle, Esquire, of New York City, and Eugene D. Millikin, Esquire, of Denver, Colorado, appeared as counsel for appellant. During the course of the trial, Mr. Battle was called as a witness on behalf of the defendant (appellant here). He testified that he was in Paris, France, in the summer of 1927, just after the subpœnas had been served on Mr. Blackmer (dates of service: May 27, 1927, and June 7, 1927), and discussed with him the constitutionality and procedure under the Walsh Act (Act of July 3, 1926, 44 Stat. 835) and as to what his action should be with respect to responding to the subpœna; that the witness informed Blackmer that he (the witness) had carefully considered the question of the constitutionality of the Act and had obtained the opinions of several prominent lawyers concerning it; that he "advised Mr. Blackmer that the Act was unconstitutional, that it was void, and

that the whole proceedings under it would be void." On cross-examination, the witness stated that he was Blackmer's counsel "considerably before this subpœna went out. I knew that letters rogatory were issued to take his testimony in the suit in Wyoming." Over objection of counsel for appellant, the witness was questioned concerning the suit of United States v. Mammoth Oil Co. (5 F. (2d) 330; 14 F. (2d) 705; 275 U. S. 13), in which the United States was seeking civil remedy on the same question on which it sought criminal remedy in the conspiracy case in which appellant was subpœnaed. Mr. Battle testified: "As Mr. Blackmer's counsel I am familiar with the fact that in the bill of the Mammoth Oil Company Case, Mr. Sinclair was charged amongst other things, with conspiracy with Mr. Fall, as in the criminal cases; that there was an application made to the United States District Judge at Cheyenne to take the testimony of Mr. Blackmer on the issues, amongst others, of conspiracy to defraud the United States; that letters rogatory were issued by Judge Kennedy, of that court, addressed to a French Court to examine Mr. Blackmer before them on certain questions propounded by the Government touching this alleged conspiracy;" that when letters rogatory were exposed to appellant and the questions propounded to him by the French judge of the French Court, he (appellant) answered to his name, gave his age, and refused to answer any further questions. The witness was asked whether appellant then knew of the provisions of the Act, and he replied, "I told him the provisions of the Act." The witness further testified:

"I would also say in regard to the letters rogatory that Mr. Blackmer depended upon the opinion of French counsel that he was not under any obligation to answer the questions addressed to him in the French court."

The purpose of the testimony of Mr. Battle that appellant was advised by eminent counsel that the Act was unconstitutional was in supposed extenuation of the offense and in mitigation of the penalty. Sinclair v. United States, 279 U. S. 749, 766. Blackmer's good faith, therefore, was involved. Tornanses v. Melsing, 106 F. 755. As bearing upon his good faith, his attitude with respect to the letters

rogatory in the civil suit was important. It is clearly recognized that the giving of testimony is a public duty. Blair v. United States, 250 U. S. 273, 281.

It is further urged that the failure to respond to the subpœna at the re-trial (R., No. 5132) resulted in no inconvenience to the Government because other testimony became available for use at that trial, and, hence, that appellant's conduct was not disrespectful to the court. It ill becomes appellant, after he has persistently manifested an intent to evade his public duty and embarrass the Government, to say that his conduct was not contemptuous of the court because other evidence was available to the Government. The Government prevailed in the civil suit, notwithstanding his refusal to testify (Mammoth Oil Co. v. United States, 275 U. S. 13), but it did not prevail in the criminal case. The result might have been different had appellant fulfilled his duty.

Under the provisions of the statute, the court might have fixed the fine at $100,000 in each case. It was fixed at $30,000 in each case. Mr. Blackmer left the United States in 1924, when it must have been apparent to him that his testimony might and probably would be sought by the Government in the attempt to uncover the fraud and corruption culminating in the oil and gas lease to the Mammoth Oil Company. Later, letters rogatory were issued, but Blackmer refused to testify and could not be coerced. His hostile attitude and his disinclination to fulfill his public duty became apparent. When his testimony was sought in the criminal case involving substantially the same facts, he refused to respond to the subpœnas, and attemped to justify his conduct by challenging the constitutionality of the Act under which the subpœnas were issued. He knew, or should have known, that it was as much his patriotic duty to yield his testimony in the Government's efforts to uncover fraud and punish the guilty as it would be his duty to bear arms in defense of his country. Indeed, the injury to the Government resulting from the refusal of a material witness to testify might be infinitely greater than that resulting from his refusal to bear arms, and, yet, the citizen "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convic-

tions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." Jacobson v. Massachusetts, 197 U. S. 11, 29.

Doubtless Congress considered the possible serious consequences which might result from the refusal of a witness to respond to a subpœna when it authorized a penalty of $100,000 for each offense. It had a right to take into consideration that ordinarily only a man of means could afford the luxury of abandoning his business and practically expatriating himself by taking up his residence abroad. A small fine in such circumstances would have no deterrent effect. In the present cases, the records indicate that Mr. Blackmer is a man of extensive business interests and large means. Considering the records as a whole, we are clearly of the view that the trial court in assessing the fines did not abuse its discretion.

Other contentions have not been overlooked, but they have not been found of sufficient merit to warrant discussion.

The judgments are affirmed.

Affirmed.

Endorsed: Nos. 5131 and 5132. Harry M. Blackmer, Appellant, v. United States. Opinion of the Court per Mr. Justice Robb. Court of Appeals, District of Columbia. Filed April 6, 1931. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, APRIL TERM, 1931

Monday, April 6th, A. D. 1931.

No. 5132

HARRY M. BLACKMER, Appellant,

v.

UNITED STATES

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia,

and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Robb, April 6, 1931.

Mr. Justice Cox, of the Supreme Court, D. C., sat in this case in the place of Mr. Chief Justice Martin.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 106, inclusive, constitute a true copy of the transcript of Record and proceedings of the said Court of Appeals in the case of Harry M. Blackmer, Appellant, vs. United States, No. 5132, April Term, 1931, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Court of Appeals, at the City of Washington, this Fifteenth day of May, A. D. 1931.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1434)